No. _____

In The
Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(f) establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23(f), are subject to equitable exceptions, because the issue was not raised below. *See, e.g.*, *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.

The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline?

As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Nutraceutical Corporation ("Nutraceutical"). In the proceeding below, Nutraceutical was the defendant-appellee. The parent corporation of Nutraceutical is HGGC, LLC. No publicly held company owns 10% or more of Nutraceutical's stock.

The Respondent is Troy Lambert. In the proceeding below, Lambert was the plaintiff-appellant. He filed a class action on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Nutraceutical Corporation ("Nutraceutical") respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 870 F.3d 1170, and reprinted at Appendix 1. The District Court's order granting Nutraceutical's motion to decertify the class is not published in the *Federal Supplement*, but it is available at 2015 WL 12655388, and reprinted at Appendix 52. The District Court's order denying Respondent Troy Lambert's motion for reconsideration is not published in the *Federal Supplement*, but it is available at 2015 WL 12655392 and reprinted at Appendix 27. The Ninth Circuit's order denying Nutraceutical's petition for rehearing en banc is reprinted at Appendix 67.

JURISDICTION

The Ninth Circuit entered judgment in this case on September 15, 2017. Appendix 1. On November 3, 2017, the Ninth Circuit denied Nutraceutical's petition for rehearing en banc. Appendix 67. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> (f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Federal Rule of Appellate Procedure 26(b)(1) provides:

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> > (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
> >
> > (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

INTRODUCTION

This case presents a recognized circuit split, as well as an important and frequently occurring issue that this Court has not yet had the opportunity to address: whether equitable exceptions apply to non-jurisdictional claim-processing rules. On numerous occasions, this Court had to leave that issue undecided because it was not properly raised below. *See, e.g., Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017); *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004). This case presents the proper vehicle to address this important question.

The specific rule at issue in this case is Federal Rule of Civil Procedure 23(f), which establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. In the decision below, the Ninth Circuit found that Rule 23(f) is not jurisdictional, and then broadly held that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1177 (9th Cir. 2017). Relying on that holding, the Ninth Circuit excused Respondent Troy Lambert's failure to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window.

The Ninth Circuit acknowledged that its decision conflicts with other United States Circuit Courts of Appeals. *Id.* at 1179 ("We recognize that other circuits would likely not toll the Rule 23(f) deadline in Lambert's

case."). In fact, every other circuit to consider this issue – *i.e.*, the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits – has held that the Rule 23(f) deadline is "strict and mandatory." *See, e.g.*, *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (collecting cases).

The Ninth Circuit's decision is also at odds with this Court's precedent. This Court has held, and reaffirmed on numerous occasions, that mandatory claim-processing rules are "unalterable" and "mandatory" if a party properly raises them. *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017); *see also Eberhart v. United States*, 546 U.S. 12, 19 (2005) ("These claim-processing rules [] assure relief to a party properly raising them.") (per curiam).

The decision below also conflicts with Federal Rule of Appellate Procedure 26(b)(1), which states that courts "may not extend the time to file . . . a petition for permission to appeal." Fed. R. App. P. 26(b)(1). As the Second, Third, and Tenth Circuits have recognized, this rule expressly prohibits extensions of the Rule 23(f) deadline. *See, e.g.*, *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.") (per curiam); *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (per curiam); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (per curiam).

Finally, the Ninth Circuit's decision contravenes Rule 23(f)'s purpose. Because interlocutory appeals

are inherently disruptive, expensive, and time-consuming, Rule 23(f) established a "deliberately small" filing window. *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *see also* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment). By applying equitable exceptions to Rule 23(f), the Ninth Circuit exacerbated the delay and disruption caused by petitions for permission to appeal.

Despite the importance of these issues, as noted above, this Court has not yet decided whether claim-processing rules like Rule 23(f) are subject to equitable exceptions because the issue was not addressed below. This case is different. It presents a timely opportunity for this Court to resolve an important question of federal procedure and resolve a recognized circuit split.

STATEMENT OF THE CASE

Respondent Troy Lambert ("Lambert") filed the underlying class action against Nutraceutical on March 14, 2013 for alleged violations of California's false advertising and unfair competition laws arising out of Nutraceutical's sale of a dietary supplement. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

The District Court initially certified the class on June 19, 2014. Following the close of discovery, on February 20, 2015, the District Court granted Nutraceutical's motion to decertify.

The District Court decertified the class because Lambert failed to "demonstrate that damages [were] measurable on a classwide basis through use of a 'common methodology' " as required by this Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013). Appendix at 56. Among other things, Lambert failed to produce evidence necessary to calculate what class members actually paid – *i.e.*, the average retail price – which he needed to proceed under his "full-refund" damages model. *Id.* at 60-65.

Pursuant to the fourteen-day deadline in Federal Rule of Civil Procedure 23(f), Lambert's deadline to file a petition for permission to appeal the District Court's decertification order was March 6, 2015.

Lambert did not file a petition or a motion for reconsideration by the deadline. Lambert also did not inform the District Court that he intended to file a petition for permission to appeal.

Instead, at a March 2, 2015 status conference, Lambert requested permission to file a "renewed motion for class certification." Appendix at 71. The District Court denied Lambert's request to file a renewed motion for class certification, but acknowledged Lambert could, pursuant to the court's local rules, file a motion for reconsideration and set a March 12 deadline. *Id.* at 73-76. Lambert filed his motion for reconsideration

on March 12, and the District Court denied the motion on June 24.

On July 8, 2015, Lambert finally filed a Rule 23(f) petition for permission to appeal with the Ninth Circuit. The petition was thus filed more than four months late.

On September 16, 2015, a Ninth Circuit motions panel conditionally granted Lambert's petition and instructed the parties "[i]n addition to all other issues the[y] wish to raise in their briefs in the appeal, [to] . . . address the timeliness of this petition." *Lambert*, 870 F.3d at 1175.

The case was then assigned to a Ninth Circuit merits panel (the Hon. Richard A. Paez, Marsha S. Berzon, and Morgan Christen), which heard oral argument on March 9, 2017. On September 15, 2017, the Ninth Circuit issued an opinion holding that Lambert's Rule 23(f) petition was timely and reversing and remanding the District Court's order.

The Ninth Circuit noted that "[u]nder the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen days of the district court's initial order decertifying the class." *Lambert*, 870 F.3d at 1176. Nevertheless, the court held that equitable exceptions applied. The Ninth Circuit reached that decision in three steps:

First, the Ninth Circuit held that Rule 23(f) is a non-jurisdictional claim-processing rule. *Id.* at 1177. Second, the Ninth Circuit joined its sister circuits in

holding that a motion for reconsideration filed in the District Court within Rule 23(f)'s fourteen-day deadline will toll the deadline. *Id.* at 1177-78.

Third, the Ninth Circuit held that equitable exceptions also apply. Citing this Court's decision in *Bowles v. Russel*, 551 U.S. 205 (2007),[1] the Ninth Circuit concluded that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert*, 870 F.3d at 1177.

The Ninth Circuit held that "in determining when equitable circumstances beyond a motion for reconsideration filed within the fourteen day Rule 23(f) deadline can toll that deadline, we look to equitable factors such as whether the litigant 'pursued his rights diligently,' [] whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Id.* at 1178.

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[1] As explained below, *Bowles* did not decide whether equitable exceptions apply to mandatory claim-processing rules. Even after *Bowles*, this Court has had to "reserve[] whether mandatory claim-processing rules may be subject to equitable exceptions," because the issue was "unaddressed" below. *Hamer*, 138 S. Ct. at 18 n.3, 22.

Applying those factors, the Ninth Circuit held that Lambert tolled the deadline because he "informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within fourteen days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing a motion for reconsideration with which Lambert complied." *Id.* at 1179.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY ON THE QUESTION PRESENTED

This case presents a clear and undisputed circuit split. As the Ninth Circuit acknowledged in its decision, "other circuits would likely not toll the Rule 23(f) deadline" in this case. *Id.* The Ninth Circuit's decision conflicts with all seven United States Circuit Courts of Appeals (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh) (the "other circuits") that have considered this issue.

As the other circuits have recognized, the Rule 23(f) deadline is "strict and mandatory" because its purpose is to reduce the inherent disruption caused by interlocutory appeals. *See, e.g.*, *Gutierrez*, 523 F.3d at 192; *see also Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of

review is deliberately small."); *Fleischman*, 639 F.3d at 31 ("It is well-established that Rule 23(f)'s fourteen day filing requirement is a rigid and inflexible restriction.") (citations omitted).

The other circuits have only adopted one "narrow exception" to the Rule 23(f) deadline – a litigant can "postpone" the time to file a petition for permission to appeal by filing a motion for reconsideration in district court *before* the fourteen-day deadline in Rule 23(f) expires. *Gutierrez*, 523 F.3d at 192-93.

The Ninth Circuit adopted that exception but then departed from the other circuits by holding that Rule 23(f)'s deadline is also subject to broad equitable exceptions. *Lambert*, 870 F.3d at 1177 (holding that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations"). Even if a litigant fails to timely file a Rule 23(f) petition or a motion for reconsideration within fourteen days, the Ninth Circuit held that courts must consider whether (i) the litigant "pursued his rights diligently," (ii) "external circumstances, such as a deadline imposed by the district court, affected the litigant," or (iii) the "litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration." *Id.* at 1178.

None of the other circuits have applied equitable exceptions to the Rule 23(f) deadline or otherwise excused a party's failure to file a petition or motion for

reconsideration within the fourteen-day deadline. Instead, the other circuits uniformly agree that "[a]n out-of-time motion for reconsideration . . . cannot 'restart the clock for appellate review' under Rule 23(f)." *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (citations omitted); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [fourteen] days after the order . . . appeal must wait until the final judgment."); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll the [] period within which to seek permission to appeal.").

As the Second Circuit explained in *Fleischman*, a contrary holding "would eviscerate [Rule 23(f)'s] deliberate and tight restriction on interlocutory appeals." 639 F.3d at 31. It would also violate Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal. *Id.* ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

Indeed, the Third, Tenth, and Eleventh Circuits have rejected untimely Rule 23(f) petitions in situations that closely resemble the facts before the Ninth Circuit. In the Third Circuit case, *Gutierrez*, the petitioners filed their Rule 23(f) petition and motion for reconsideration late, however they did the things necessary to obtain equitable tolling under the Ninth Circuit's decision. They had requested, by letter, an extension of time to file a motion for reconsideration

within ten days of the order denying certification, the district court granted the request, and they filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. *Gutierrez*, 523 F.3d at 190-91.

In contrast to the Ninth Circuit, the Third Circuit rejected the untimely petition. Even assuming equitable exceptions could apply, a decision the court did not reach, the Third Circuit explained that Rule 23(f) "is clearly a strict and inflexible time limit" that cannot excuse petitioner's mistaken reliance on the district court's scheduling order. *Id.* at 198 ("Petitioners cannot use the District Court's approval of the extension of time to save their untimely petition.").

In addition, the Third Circuit rejected the Ninth Circuit's reasoning that a letter filed in district court indicating the petitioner's intent to file a motion for reconsideration could toll the Rule 23(f) deadline. The Third Circuit held that allowing a mere letter to serve that purpose "would be inconsistent with the generally rigid, strict approach courts have taken when construing the Rule 23(f) time limit." *Id.* at 195 n.7.

The Eleventh Circuit came to a similar conclusion in *Jenkins v. BellSouth Corp.*, 491 F.3d 1288 (11th Cir. 2007). There, the court held that a Rule 23(f) petition was untimely because the plaintiffs missed the filing deadline, even though the deadline was on the eve of Thanksgiving Day, the petition was only two days late, the plaintiffs had instructed a courier to file the petition before the deadline, and the district court vacated

and reentered its order to restart the deadline. *Id.* at 1289-92. The court held that the "single opportunity for seeking interlocutory review of the denial of class certification expired on November 22, 2006, and . . . the district court was without the authority to circumvent the [] deadline." *Id.* at 1292.

Similarly, in *Delta Airlines*, 383 F.3d at 1145, the Tenth Circuit rejected a Rule 23(f) petition that was filed only two days late even though the petitioner's counsel had miscalculated the filing deadline by mistakenly relying on the grace period in Fed. R. Civ. P. 6(e) and Fed. R. App. P. 26(c) and, in response, the district court had granted an extension of time to file the petition. The Tenth Circuit held that the district court lacked authority to extend the deadline and petitioner's counsel's ignorance of the rules could not excuse the untimely filing. *Id.* The Tenth Circuit also noted that Federal Rule of Appellate Procedure 26(b) "specifically foreclose[s] appellate courts from granting an extension of time to file a petition for permission to appeal." *Id.*

For the foregoing reasons, the Ninth Circuit's decision presents a clear and undisputed circuit split.

II. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE

The question presented is of critical legal and practical significance. As this Court is aware, decisions on class certification can effectively end a lawsuit. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707-08

(2017). Interlocutory appeals of class certification decisions, however, have profound negative consequences. They are "disruptive, time-consuming, and expensive . . . add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (citations omitted). Resolution of the question presented will therefore affect the ability of both plaintiffs and defendants to obtain meaningful review of class certification decisions while also deciding the extent to which this type of review can disrupt district court proceedings.

While these issues are significant, the Ninth Circuit's decision raises even broader and weightier concerns. As noted above, the Ninth Circuit did not limit its holding to Rule 23(f). The Ninth Circuit held that equitable tolling applies to any non-jurisdictional deadline. *Lambert*, 870 F.3d at 1177 ("Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.").

These types of mandatory claim-processing rules are abundant in the federal rules and procedure. Consider, for example, the sheer number of rule-based deadlines in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Bankruptcy Procedure. Absent intervention by this Court, the Ninth Circuit's decision will change how all of these claim-processing rules are enforced in the largest circuit in the country.

III. THIS CASE IS THE PROPER VEHICLE TO ADDRESS THIS IMPORTANT ISSUE

This Court has not yet had an opportunity to address whether mandatory claim-processing rules are subject to equitable exceptions. In numerous cases, this Court had to leave that issue undecided because it was not properly presented below.

In *Hamer*, for example, the Court held that the thirty-day limitation on extensions of time to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(5)(C) was a mandatory claim-processing rule. 138 S. Ct. at 22. The Court "reserved whether mandatory claim-processing rules may be subject to equitable exceptions," however, because the issue was "unaddressed" below. *Id.* at 18 n.3, 22.

Likewise, in *Kontrick* the Court concluded that Federal Rule of Bankruptcy Procedure 4004 is a mandatory claim-processing rule. 540 U.S. at 454. Because the case "involve[d] no issue of equitable tolling or any other equity-based exception," however, this Court did not reach the question of whether claim-processing rules "despite their strict limitations, could be softened on equitable grounds." *Id.* at 457-58; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 442 n.4 (2011) (not deciding whether a non-jurisdictional rule setting the deadline to appeal a denial of veteran benefits is subject to equitable tolling because the parties did not ask the Court to address that issue).

These obstacles to review are not present here. There is no question the Ninth Circuit concluded that

equitable exceptions apply to mandatory claim-processing rules like Rule 23(f). And there is no question that the Ninth Circuit's decision conflicts with the other circuits. This case presents a timely opportunity for this Court to resolve this important issue.

IV. THE DECISION BELOW WAS INCORRECT

This Court's intervention is also needed because the decision below is wrong. Among other issues, the Ninth Circuit's decision (i) is inconsistent with this Court's precedent; (ii) violates Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal; and (iii) contravenes the purpose behind Rule 23(f)'s deadline, which was "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment).

A. The Decision Below is Inconsistent with this Court's Precedent

Although this Court has not squarely addressed whether mandatory claim-processing rules are subject to equitable exceptions, its precedent suggests that they are not. This Court has held, and reaffirmed on numerous occasions, that mandatory claim-processing rules are "unalterable" and "mandatory" if a party properly raises them. *Manrique*, 137 S. Ct. at 1271 (2017).

For example, in *Eberhart*, this Court held that Federal Rule of Criminal Procedure 33(b)(2), which establishes the deadline to file a motion for a new trial on any reason other than newly discovered evidence, is a mandatory claim-processing rule. 546 U.S. at 13. The Court held that claim-processing rules are "unalterable on a party's application." *Id.* at 15 (quoting *Kontrick*, 540 U.S. at 456). In other words, "these claim-processing rules [] assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19.

Importantly, *Eberhart* rejected an argument that claim-processing rules are subject to equitable exceptions when addressing the Court's decision in *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, this Court reversed the Seventh Circuit's ruling that an "excusable neglect" exception applied to untimely notices of appeal. *Eberhart*, 546 U.S. at 17. As *Eberhart* explained, "*Robinson* is correct not because the District Court lacked subject-matter jurisdiction, but because district courts ***must observe*** the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* (emphasis added).

The Court reaffirmed *Eberhart*'s holding in *Manrique*. There, this Court held that a rule requiring a party to file a notice of appeal of an amended judgment is "at least a mandatory claim-processing rule." 137 S. Ct. at 1271. The Court explained that mandatory claim-processing rules, unlike jurisdictional rules, can be forfeited if they are not timely asserted. If a party "properly raise[s] them," however, they are

"unalterable." *Id.* at 1272. Because the Government had timely raised the petitioner's failure to timely file a notice of appeal from an amended judgment, the Court held that the lower "court's duty to dismiss the appeal was ***mandatory***." *Id.* (emphasis added).

In addition, this Court has already decided, in a closely analogous context, that a district court's scheduling order cannot toll an appeal deadline. In 2016, the Court resolved a circuit split by amending Federal Rule of Appellate Procedure 4(a)(4) to clarify that the time to file a notice of appeal may be tolled by the filing of certain post-judgment motions – but only if they are timely filed pursuant to deadlines in the Federal Rules of Civil Procedure. As the advisory committee notes explain, that rule "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules." Fed. R. App. P. 4 advisory committee's note (2016 Amendment).

As these cases and rules make clear, mandatory claim-processing rules must be enforced if they are properly raised. The Ninth Circuit's holding that equitable exceptions apply to mandatory claim-processing rules is inconsistent with this Court's precedent.

B. The Decision Below Violates the Federal Rules of Appellate Procedure

In addition, the Ninth Circuit's holding violates Federal Rule of Appellate Procedure 26(b)(1). That rule plainly states:

> For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court ***may not extend*** the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) ***or a petition for permission to appeal***. . . .

Fed. R. App. P. 26(b)(1) (emphasis added).

The Second, Third, and Tenth Circuits have held that this rule prohibits courts from extending the time to file a Rule 23(f) petition for permission to appeal. *Fleischman*, 639 F.3d at 31 ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal."); *Eastman*, 736 F.3d at 677 (rejecting Rule 23(f) petition because Fed. R. App. P. 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal"); *Delta Airlines*, 383 F.3d at 1145 (same); *see also Houston v. Lack*, 487 U.S. 266, 281 (1988) (Scalia, J., dissenting) (noting that Fed. R. App. P. 26(b) makes "explicit" that courts are "without power to waive" appeal deadlines, "no matter what the equities of a particular case").

Indeed, Federal Rule of Appellate Procedure 26(b)(1) closely parallels Federal Rule of Criminal Procedure 45(b)(2), which this Court relied upon in *Eberhart* to hold that the mandatory claim-processing rule at issue in that case is "unalterable." As *Eberhart* explained, Federal Rule of Criminal Procedure 45(b)(2)

provides that courts "may not extend the time to take any action under [Fed. R. Crim. P. 33], except as stated" in the rule itself. 546 U.S. at 13. As a result, the Court concluded that the deadline is "rigid" and "unalterable on a party's application." *Id.* at 13, 15, 19. Because Federal Rule of Appellate Procedure 26(b)(1) provides a similar prohibition against extensions of time to file a petition for permission to appeal, this Court's analysis of Rule 23(f) should be the same.

Despite the above, the Ninth Circuit adopted equitable exceptions to the Rule 23(f) deadline that did and, in future cases, will extend the time to file a petition for permission to appeal. Federal Rule of Appellate Procedure 26(b)(1) is a rule promulgated by this Court to "govern procedure in the United States courts of appeals." Fed. R. App. P. 1(a)(1); *see also* 28 U.S.C. § 1292(e). The Ninth Circuit had no authority to abrogate it, and that error warrants correction by this Court.

C. The Decision Below Contravenes the Purpose of an Interlocutory Appeal Deadline

The Ninth Circuit's decision also contravenes the very purpose behind Rule 23(f)'s short deadline. It is well recognized that petitions for permission to appeal, like other interlocutory appeals, are "generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan*, 402 F.3d at 959; *Microsoft*, 137 S. Ct. at 1712 (final judgment rule "minimizes

the harassment and delay that would result from repeated interlocutory appeals").

To address these concerns, Rule 23(f) establishes a "deliberately small" fourteen-day filing window. *Gary*, 188 F.3d at 893. The short deadline, as the advisory committee notes explain, is "designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment); *see also Jenkins*, 491 F.3d at 1290 ("[T]he [] deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Chamberlan*, 402 F.3d at 959 ("Although Rule 23(f) expands opportunities to appeal certification decisions, the drafters intended interlocutory appeal to be the exception rather than the rule.").

Departing from its sister circuits, the Ninth Circuit adopted a rule that disregards the concerns noted above and exacerbates the delay and disruption caused by interlocutory appeals. Under the Ninth Circuit's rule, litigants have no incentive to diligently pursue petitions for permission to appeal or motions for reconsideration within fourteen days of a district court's order. Instead, litigants can preserve their right to appeal by simply writing a letter or orally informing the district court that they *intend* to file a motion for reconsideration. District courts will undoubtedly see an influx of such communications and, at the least, this will add months to the already significant delays associated with Rule 23(f) petitions.

Relatedly, the Ninth Circuit replaced a simple, bright-line rule with a vague and impractical standard. Courts can no longer rely on the fourteen-day deadline to quickly deny untimely petitions for permission to appeal. Instead, they will need to scour the district court record, including transcripts, to determine whether the petitioner engaged in any conduct that would entitle him to equitable tolling. This type of review will add even more work to the already heavy court dockets.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are highly fact-dependent. Under the Ninth Circuit's standard, courts will be forced to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline. Courts should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter v. Boeing*, 456 F.3d 1183, 1191 (10th Cir. 2006).

Likewise, the Ninth Circuit's reliance on the district court's briefing schedule will require courts to consider whether a petitioner has complied with a district court's schedule. This defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across the district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within 28 days. C.D. Cal. L.R. 7-18; S.D. Cal. Civil

L.R. 7.1(i); *see also* N.D. Cal. Civil L.R. 7-9 (requiring leave of court); D. Ariz. LRCiv 7.2(g) (fourteen-day deadline). Courts must now take the local rules (and their differences) into account.

Finally, and for similar reasons, the standard will inject uncertainty into, and prolong, district court proceedings. Although a district court need not enter a stay when a Rule 23(f) petition is pending, very few district courts will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, for example, district court proceedings were stayed for over *two years*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY LAMBERT, on Behalf of Themselves and All Others Similarly Situated, *Plaintiff-Appellant*, v. NUTRACEUTICAL CORP., *Defendant-Appellee.*	No. 15-56423 D.C. No. 2:13-cv-05942-AB-E OPINION

Appeal from the United States District Court
for the Central District of California
André Birotte, Jr., District Judge, Presiding

Argued and Submitted March 9, 2017
Pasadena, California

Filed September 15, 2017

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges.

Opinion by Judge Paez

COUNSEL

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OPINION

PAEZ, Circuit Judge:

Federal Rule of Civil Procedure 23(f) allows a litigant to seek an interlocutory appeal of a district court's order granting or denying class certification. This case is about whether and when the fourteen-day Rule 23(f) deadline may be tolled. In a matter of first impression for this court, we hold that the Rule 23(f) deadline is not jurisdictional, thus equitable exceptions apply. We therefore hold that a motion for reconsideration filed within the Rule 23(f) deadline will toll the deadline. Parting ways with some of our sister circuits, we further hold that additional equitable circumstances may also warrant tolling. As a result, we hold that the Rule 23(f) deadline was tolled here, when counsel for the lead plaintiff, within fourteen days of the district court's decertification order, informed the court of his intention to seek reconsideration, explained his reasons for doing so, and the court set a date for filing the motion with which counsel complied. As for the merits of the Rule 23(f) petition, we hold that the district court abused its discretion in decertifying the class, and therefore reverse and remand.

I.

Lambert purchased "Cobra Sexual Energy," an alleged aphrodisiac dietary supplement manufactured and marketed by Nutraceutical, which the Food and Drug Administration ("FDA") had not approved. Labels on Cobra Sexual Energy boasted that it contained performance-enhancing herbs that would provide users with "animal magnetism" and "potency wood." On the basis of these labels, Lambert believed that the product would enhance his sexual performance and increase the frequency with which he could engage in sexual activity. Had he known that the labels' claims were false, he would not have purchased the product.

According to Lambert, Cobra Sexual Energy violated the FDA's aphrodisiac drug rule because it claimed to increase sexual desire but had not been through clinical testing, as required by 21 C.F.R. § 310.528(c); nor had it received FDA approval, as required by 21 C.F.R. § 310.528(b). The product also failed to display prominently a disclaimer that it had not been evaluated by the FDA, in alleged violation of 21 U.S.C. § 343(r)(6)(C). Moreover, Lambert alleges that the supplement contained an ingredient, yohimbe, which is dangerous for certain persons in certain doses, yet the product label contained no warning of that risk.

Lambert brought a consumer class action for violations of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §17200 et seq.), False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 et

seq.), and Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 et seq.). Lambert brought his class action under Federal Rule of Civil Procedure 23(b)(3), which provides that a class may be certified if "questions of law or fact common to class members predominate over any questions affecting only individual members."

The district court initially granted class certification on the basis of the full refund damages model. That model applies when a product is shown to be worthless, and damages may be calculated by multiplying the average retail price by the number of units sold. In granting class certification, the district court concluded that Lambert put forth a "tenable theory that monetary relief can be ascertained on a classwide basis . . . [that] can be readily calculated using Defendant's sales numbers and an average retail price." The case was subsequently reassigned to a different district judge because the original judge retired. Discovery proceeded and closed. Nutraceutical then filed a motion for decertification of the class, upon which the newly assigned district judge held a hearing.

On February 20, 2015, the district court granted the motion to decertify. The district court found that Lambert's full refund damages model was "consistent with his theories of liability." The court proceeded to find, however, that Lambert "failed to provide the key evidence necessary to apply his classwide model for damages," so common issues did not predominate. The district court required Lambert to provide the actual

average retail price, and Lambert had provided only the suggested retail price.

During a March 2, 2015 status conference, ten days after the order decertifying the class, Lambert informed the court of his intention to file a motion for reconsideration. Counsel explained that he had a damages model and evidentiary support for it. The district court instructed Lambert to file the motion for reconsideration within ten days – i.e., within twenty days in total from the order decertifying the class.

As directed by the district court, ten days later, on March 12, 2015, Lambert moved for reconsideration and asked for recertification. In his motion for reconsideration, Lambert pointed to evidence he had presented in his class certification motion showing that the suggested retail price could be used in conjunction with other evidence to establish the full refund damages model. Lambert also argued for the first time that, as an alternative, he could prove damages through non-restitutionary disgorgement.

The district court denied Lambert's motion for reconsideration three months later. The court rejected Lambert's contention that the average retail price could be calculated from the suggested retail price. The district court also rejected Lambert's non-restitutionary disgorgement argument, reasoning that he waived it by presenting it for the first time in his motion for reconsideration. The court proceeded to hold that even if Lambert had not waived the non-restitutionary disgorgement argument, it was improper under California

law, as restitution should be measured by what the plaintiffs lost, not by what the defendants gained; in other words, the district court held, non-restitutionary disgorgement is not available under California law.[1] In addition to declining to recertify the class, the order set forth a plan for notifying the class regarding decertification.

Within fourteen days of the order denying his motion for reconsideration, Lambert filed in this court a Rule 23(f) petition for permission to appeal the district court's orders granting the motion for class decertification and denying the motion for reconsideration. Upon the filing of that petition, the district court stayed proceedings pending appeal. A motions panel of this court conditionally granted Lambert's Rule 23(f) petition, instructing the parties "[i]n addition to all other issues the[y] wish to raise in their briefs in the appeal, [to] . . . address the timeliness of this petition."

II.

Because the motions panel only conditionally granted the petition and referred the issue of timeliness to this panel, we review de novo its timeliness. *See Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1045-46 (9th Cir. 2015) (reviewing the timeliness of a Rule

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[1] While non-restitutionary damages refer to the defendant's revenues regardless of the plaintiff's relationship to those damages, restitutionary damages refer to the portion of the defendant's revenues over which the plaintiff has some ownership claim. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 941 (Cal. 2003).

23(f) petition after the petition was conditionally granted by a motions panel).

As to the merits of the petition, we review the district court's class decertification ruling for an abuse of discretion. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090-91 (9th Cir. 2010). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)). We review findings of fact in the class certification determination for clear error. *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013).

III.

Rule 23(f) governs interlocutory appeals of "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f). The Rule requires that a petition for permission to appeal be filed "within 14 days after the order is entered." *Id.* Rule 23(f) is silent as to the effect of motions for reconsideration on this deadline. Here, the district court decertified the class on February 20, 2015. Lambert's Rule 23(f) petition, however, was not filed until June 24, 2015, fourteen days after the court denied his motion for reconsideration. Under the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen

days of the district court's initial order decertifying the class. In other words, unless an exception applies, Lambert's Rule 23(f) petition would be barred.

To determine whether Lambert's Rule 23(f) petition is timely, we must first determine whether Rule 23(f) is jurisdictional. We conclude that it is non-jurisdictional, and that equitable remedies softening the deadline are therefore generally available. Specifically, we hold that a motion for reconsideration filed within fourteen days of the certification order tolls the Rule 23(f) deadline. We also hold that the deadline can be tolled as a result of additional equitable circumstances. In light of the circumstances in this case, we conclude that the Rule 23(f) deadline was tolled and deem Lambert's petition timely.

A.

We turn first to whether the fourteen-day deadline in Rule 23(f) is jurisdictional. Two Supreme Court cases primarily guide our inquiry. In *Eberhart v. United States*, the Court held that a deadline in the Federal Rules of Criminal Procedure was not jurisdictional because it was a procedural claim-processing rule, as opposed to a rule that delineated the classes of cases or persons within a court's adjudicatory authority. 546 U.S. 12, 15-16 (2005). Several years later, the Court held in *Bowles v. Russell* that deadlines contained in statutes are jurisdictional, but non-statutory deadlines, such as those in the Federal Rules of Civil

or Criminal Procedure, may instead be procedural "claims-processing" rules. 551 U.S. 205, 211-14 (2007).

We have not yet had occasion to apply these cases to Rule 23(f). We have, however, concluded that an immigration regulation requiring a petitioner to file his notice of appeal with the Board of Immigration Appeals within thirty days of the immigration judge's adverse ruling is not jurisdictional because it is regulatory, rather than statutory. *Irigoyen-Briones v. Holder*, 644 F.3d 943, 948-49 (9th Cir. 2011). In *Irigoyen-Briones*, we also noted that the regulatory provision that contained the deadline did not use the word "jurisdiction," and that the Supreme Court had narrowly defined jurisdictional rules as those that remove a court's authority to hear a case. *Id.*

The Third Circuit has had occasion to consider the jurisdictional nature of Rule 23(f). In *Gutierrez v. Johnson & Johnson*, the Third Circuit held that in light of *Bowles*, the Rule 23(f) deadline is not jurisdictional because it is set forth in a rule promulgated by the Supreme Court, not a statute enacted by Congress. 523 F.3d 187, 197-98 (3d Cir. 2008). Other circuits have likewise suggested that the Rule 23(f) deadline is not jurisdictional. *See, e.g.*, *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (noting that although the court had previously held Rule 23(f) to be jurisdictional, *Eberhart* "casts doubt" on that notion); *Coco v. Inc. Vill. of Belle Terre, NY*, 448 F.3d 490, 491-92 (2d Cir. 2006) (declining to decide whether Rule 23(f) is jurisdictional, but noting that *Eberhart* "calls the jurisdictional nature of Rule 23(f) into question").

We conclude that under *Bowles* and *Eberhart*, the Rule 23(f) deadline is not jurisdictional because it is procedural, does not remove a court's authority over subject matters or persons, and is in the Federal Rules of Civil Procedure, rather than in a statute.

B.

Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.[3] When deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations. *Bowles*, 551 U.S. at 211-14; *Gutierrez*, 523 F.3d at 197 ("The import of this distinction between jurisdictional and non-jurisdictional rules, according to the Supreme Court, is that courts cannot create equitable exceptions to jurisdictional time limits.").

Equitable exceptions arise from the "traditional power of the courts to apply the principles . . . of equity jurisprudence. The classic example is the doctrine of equitable tolling, which permits a court to pause a statutory time limit when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (citations and internal quotation marks

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[3] Equitable exceptions include tolling, the unique circumstances doctrine, and others. *See Gutierrez*, 523 F.3d at 197. Because we resolve this case on the basis of tolling, we need not address the unique circumstances doctrine.

omitted). "At bottom, the purpose of equitable tolling is to 'soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having [her] day in court.'" *Rudin v. Myles*, 781 F.3d 1043, 1055 (9th Cir. 2015) (alteration in original) (quoting *United States v. Buckles*, 647 F.3d 883, 891 (9th Cir. 2011)).

C.

All circuits to consider tolling the Rule 23(f) deadline have held that the deadline may be tolled when a litigant files a motion for reconsideration within the fourteen-day deadline.[3] These circuits have reasoned, for example, that "federal courts long have held that a motion for reconsideration tolls the time for appeal, provided that the motion is made within the time for appeal." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d

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[3] *See Gutierrez*, 523 F.3d at 193 (holding that "for the purpose of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [fourteen]-day period set forth in Rule 23(f)"); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (stating that a motion for reconsideration filed within fourteen days of the order granting or denying class certification can toll a Rule 23(f) deadline); *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31-32 (2d Cir. 2011) (same with respect to a motion to amend); *In re DC Water & Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (same with respect to a motion for reconsideration); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007) (same); *Carpenter*, 456 F.3d at 1190-92 (same); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (same); *Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999) (same); *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 n.1 (11th Cir. 2001) (same); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 836-37 (7th Cir. 1999) (same).

832, 837 (7th Cir. 1999). We agree, and therefore hold, as a baseline matter, that a motion for reconsideration filed within fourteen days of a certification decision tolls the Rule 23(f) deadline.

D.

Of course, in this case, that holding does not end the inquiry. Lambert did not file his motion for reconsideration until *twenty* days after the district court decertified the class. We nonetheless hold that Lambert is entitled to tolling given the history of this case.

Equitable exceptions such as tolling are meant to allow a "a good faith litigant" to have "[her] day in court." *Rudin*, 781 F.3d at 1055 (alteration in original) (internal quotation marks omitted). Accordingly, in determining when equitable circumstances beyond a motion for reconsideration filed within the fourteen day Rule 23(f) deadline can toll that deadline, we look to equitable factors such as whether the litigant "pursued his rights diligently," and whether external circumstances, such as a deadline imposed by the district court,[4] affected the litigant. *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2050.

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[4] Petitions for certiorari in the Supreme Court provide a useful analogy. The advisory committee notes to Rule 23(f) provide that "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. In discussing the timeliness of a Rule 23(f) petition, the Eleventh Circuit cited the advisory committee's certiorari analogy. *Jenkins*, 491

We also look, as a factor, to whether a litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action. We are not alone in considering this as a factor. In *McNamara v. Felderhof*, the Fifth Circuit considered whether tolling of Rule 23(f)'s deadline was available when a litigant stated in a court filing that he would seek reconsideration of certification within fourteen days, but did not file a formal motion for reconsideration within that time. 410 F.3d 277, 279-80 (5th Cir. 2005). The Fifth Circuit concluded that a "Trial and Case Management Plan" ("the Plan") could toll the Rule 23(f) filing deadline. *Id.* The Plan specifically sought "revisitation and modification" of the class certification ruling. *Id.* at 280 (internal quotation marks omitted). The Fifth Circuit reasoned that the Plan should be considered a motion for reconsideration for tolling purposes because it "called into question the correctness of the district court's [certification] order." *Id.* The Fifth Circuit also reached this conclusion because it "d[id] not read Rule 23(f) as so limiting in

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F.3d at 1290; *cf. Blair*, 181 F.3d at 833-34 (looking to petitions for certiorari to determine substantive standards for Rule 23(f)). Petitions for certiorari must be filed within ninety days, but may be filed later when a timely petition for rehearing is granted or when the court of appeals entertains an untimely petition for rehearing. Sup. Ct. R. 13(1), (3). By analogy, much like the courts of appeals' authority to affect the Supreme Court's certiorari petition deadline, district courts have authority to affect the Rule 23(f) deadline.

nature."[5] *Id.* The Seventh Circuit has stated, similarly, that it does not "matter[] what caption the litigant places on the motion to reconsider." *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). Accordingly, an important factor in the tolling analysis is whether the litigant provided, within the Rule 23(f) deadline, notice of the intent to seek reconsideration.

Here, a number of equitable factors support tolling the Rule 23(f) deadline. Lambert clearly conveyed his intention to file a motion for reconsideration seeking recertification on the tenth day after entry of the order decertifying the class. At a status conference, Lambert specifically informed the court of his intention to seek recertification and briefly explained his reasons for doing so. The district court then instructed Lambert to file his motion within ten days, which allotted him twenty days in total from the decertification order. The district court imposed the deadline after an exchange with Lambert's counsel as to whether it was reasonable. Lambert complied, and filed his motion for reconsideration within the period set by the district court. Lambert also filed the Rule 23(f) petition within fourteen days after the district court denied the motion for reconsideration. We hold that because Lambert informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within fourteen days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing a

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[5] *McNamara* ultimately dismissed the petition as untimely because the Plan was not filed within the Rule 23(f) deadline.

motion for reconsideration with which Lambert complied, the Rule 23(f) deadline should be tolled.

We recognize that other circuits would likely not toll the Rule 23(f) deadline in Lambert's case. To the extent other circuits limit Rule 23(f) tolling only to the circumstance where a motion for reconsideration is filed within fourteen days of the certification order, we part ways with them. Other circuits have, for example, held that a motion for reconsideration filed more than fourteen days after a certification order will not toll the deadline even when the district court set or influenced that deadline. In a case in which a district court extended the time to file a motion for reconsideration well beyond the Rule 23(f) deadline, the Third Circuit held that even if a motion for reconsideration is timely for the district court's purposes, it is untimely if it is filed outside of Rule 23(f)'s fourteen-day period. *Gutierrez*, 523 F.3d at 193 n.5 ("[A] motion to reconsider that is filed more than [fourteen] days after an order granting or denying class certification will not toll the time to file a 23(f) petition, even if the motion is 'timely' as defined by the district court's rules or its scheduling order."); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1289 (11th Cir. 2007) (providing that a district court cannot manipulate the timeliness of a Rule 23(f) petition by vacating and reentering the order denying class certification to make it timely); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (holding that even if a district court extended the time to file a Rule 23(f) petition, this could not toll the fourteen-day period because the district court lacked

such authority). Similarly, the Third Circuit held that an informal letter to the district court conveying an intent to seek reconsideration of a certification decision filed within fourteen days would not toll the time to file a Rule 23(f) petition, because it did not specifically request certification nor provide reasons why the certification order was wrong. *Gutierrez*, 523 F.3d at 194-95.

The reasons offered by other circuits for strictly limiting the availability of Rule 23(f) tolling, by only allowing for tolling when a motion for reconsideration is filed within the fourteen-day period, are not persuasive.

First, the fourteen-day deadline is for filing a Rule 23(f) petition, not for filing a motion for reconsideration in federal court. Thus, the fourteen-day limitation on tolling has no basis in Rule 23 or any other Rule, but instead is a judicial construct. Litigants have no reason to know that their deadline for filing a motion for reconsideration is effectively fourteen days, rather than whatever the district judge has ordered.

Second, those circuits that have strictly construed the Rule 23(f) fourteen-day deadline have reasoned that Rule 23(f) petitions slow down litigation, are disruptive, and inject uncertainty into class action litigation.[6] For example, the District of Columbia Circuit

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[6] In defining the substantive standards of Rule 23(f), we adopted much of the reasoning discussed by other circuits with respect to timing:

> First, the rule provides a mechanism through which appellate courts, in the interests of fairness, can restore

explained that "[c]ourts generally disfavor interlocutory appeals because they disrupt ongoing trial court proceedings and squander resources." *In re DC Water & Sewer Auth.*, 561 F.3d 494, 497 (D.C. Cir. 2009); *see also Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001) (describing Rule 23(f) petitions as "an avenue of last resort" and "inherently disruptive, time-consuming, and expensive"). The Third Circuit in *Gutierrez* explained that, as a result, the Rule 23(f) deadline is purposely short, to "ensure that interlocutory appeals of class certification decisions are heard and decided in a timely manner, so as not to disrupt the proceedings at the district court level." 523 F.3d at 199 (citing Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment). The Eleventh Circuit has expressed concern that appellate court review generally takes more time than disposition by a trial court. *Shin*, 248 F.3d at 1064. Moreover, the Seventh Circuit explained that because class certification can have major consequences for litigation strategies and

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> equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial. And second, the rule furnishes an avenue . . . [to] take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law. . . . Interlocutory appeals are generally disfavored because they are disruptive, time-consuming, and expensive.

Chamberlan v. Ford Motor Co., 402 F.3d 952, 957-59 (9th Cir. 2005) (per curiam) (citations and internal quotation marks omitted).

resources, and for the possibility of settlement, allowing for only one short window of review "permit[s] the parties to proceed in confidence about the scope and stakes of the case." *Sheahan*, 188 F.3d at 893.

The premise that Rule 23(f) petitions are disruptive and slow is not universally true and we decline to adopt any hard and fast rule on the basis of such an idea. First, Rule 23(f) petitions do not actually slow down litigation. Rule 23(f) petitions do not automatically stay district court proceedings – only the district court can grant a stay, as it did in this case, and it has discretion whether or not to do so. *See Blair*, 181 F.3d at 835 (suggesting that such stays will be infrequent). Likewise, district courts are bound to experience delay when they are confronted with motions for reconsideration, irrespective of any Rule 23(f) petition. The district court in this case, for example, kept Lambert's motion for reconsideration under submission for more than three months; and statistical studies by the Federal Judicial Center show that median ranges for decisions on class certification motions range from seven to fifteen months. *See* Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 27 (1996), http://www.uscourts.govisites/default/files/rule23_1.pdf. The Third and Eleventh Circuits' suggestions that district courts "ordinarily" rule on motions for reconsideration more quickly than appellate courts, and are "expect[ed]" to do so, are vague and lack persuasive force in light of the evidence to the contrary. *See Gutierrez*, 523 F.3d at 199; *Shin*,

248 F.3d at 1064. We recognize that Rule 23(f) petitions may lengthen litigation. But so do motions for reconsideration of a class action decertification decision when no 23(f) petition is filed, which every circuit to consider the question has treated as valid grounds for equitable tolling.

Third, Rule 23(f) petitions do not uniquely disrupt or inject uncertainty into the litigation. Rule 23(c)(1)(C) allows modifying or amending an order granting or denying class certification up to the time of final judgment, at the discretion of the district court. Fed. R. Civ. P. 23(c)(1)(C)[7]; *see In re DC Water & Sewer Auth.*, 561 F.3d at 497 (noting that district courts may reconsider and modify class certification throughout the case); *Shin*, 248 F.3d at 1064 (explaining that district courts have the ability, "and perhaps even a duty," to reconsider certification as the case progresses). If the district court may change its class certification decision at any time, interlocutory review should not affect the parties' level of certainty as to the finality of that decision, nor should it be unusually or particularly disruptive. *See* Michael G. McLellan, *If at First You Don't Succeed: The Varying Standards Applicable to Renewed Motions for Class Certification*, 30 A.B.A. ANTITRUST 89, 92 (Summer 2016) (suggesting that Rule 23(f) and Rule 23(c)(1)(C) are strategic alternatives available to class action litigants).

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[7] Federal Rule of Civil Procedure 23 (c)(1)(C) provides: "An order that grants or denies class certification may be altered or amended before final judgment."

If anything, Rule 23(f) appellate review may increase the level of certainty for litigants. Once an appellate court speaks to class certification issues in a Rule 23(f) appeal, the district court can no longer reconsider those issues under Rule 23(c)(1)(C), or at least its authority to do so will be narrowed by the court of appeals' ruling, thus enhancing certainty for the parties and the district court. *See McLel'an*, *supra*, at 92 (explaining that a Rule 23(f) decision constrains the district court's ability to alter or amend certification under Rule 23(c)(1)(C)) (citing *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 703 (5th Cir. 2010)).

In sum, we hold that (1) Rule 23(f)'s deadline is not jurisdictional, (2) equitable exceptions therefore apply, such that (3) motions for reconsideration filed within fourteen days toll that deadline. We also hold that (4) equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline. As discussed above, equitable circumstances tolled the Rule 23(f) fourteen-day deadline so that Lambert's 23(f) petition was timely filed in this court.[8]

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[8] The parties also debate whether an order granting a motion for reconsideration provides a new fourteen-day window to file a Rule 23(f) petition, because such an order is "an order granting or denying class certification." This would be another issue of first impression for this court. Other circuits to consider the issue have held that petitioners receive an additional fourteen days to file a Rule 23(f) petition if a motion for reconsideration is granted and changes the status quo of class certification, regardless of when the motion is filed. *See Nucor Corp.*, 760 F.3d at 343; *Fleischman*, 639 F.3d at 31; *In re DC Water & Sewer Auth.*, 561 F.3d at 496;

IV.

As Lambert's petition was timely, we turn to the merits, and conclude that the district court abused its discretion in decertifying the class on the basis of Lambert's inability to prove restitution damages through the full refund model.

Lambert brought his consumer class action under Federal Rule of Civil Procedure 23(b)(3). "Under Rule 23(b)(3), the court must find that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Pulaski*, 802 F.3d at 985. A Rule 23(b)(3) plaintiff must show a class wide method for damages calculations as a part of the assessment of whether common questions predominate over individual questions. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). The party seeking to maintain class certification bears the burden of demonstrating that the Rule 23 requirements are satisfied, even on a motion to decertify. *Mario v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011); *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010).

We have repeatedly emphasized that uncertain damages calculations should not defeat certification. In *Yokoyama*, we held that "damage calculations alone

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Gutierrez, 523 F.3d at 194; *Jenkins*, 491 F.3d at 1291-92; *Carpenter*, 456 F.3d at 1191-92; *McNamara*, 410 F.3d at 281. We need not decide this question, as we hold that Lambert's petition was timely under a tolling theory, and, in any case, the district court denied Lambert's motion.

cannot defeat certification." 594 F.3d at 1094. After our decision in *Yokoyama*, the Supreme Court held in *Comcast* that a Rule 23(b)(3) plaintiff must show that "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013). We have since reconciled our holding that uncertain damages cannot destroy class certification with *Comcast's* holding that plaintiffs must show that their damages are capable of classwide measurement. In *Leyva*, we reaffirmed that uncertain damages calculations alone cannot defeat class certification because *Comcast* stood only for the proposition that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva*, 716 F.3d at 513-14.

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. *Id.* at 514; *see also Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (explaining that the law "requires only that damages be capable of measurement based upon reliable factors without undue speculation"). "[T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Pulaski*, 802 F.3d at 989 (quoting *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 939 (9th Cir.1999)); *see also Just Film, Inc. v. Buono*, 847 F.3d 1108, 1121 (9th Cir. 2017) (reaffirming that so long as the proposed damages model is attributable to the plaintiff's legal theory of the harm,

and damages can be determined without excessive difficulty, decertification is not warranted).

Class wide damages calculations under the UCL, FAL, and CLRA are particularly forgiving. California law "requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Pulaski*, 802 F.3d at 989 (quoting *Marsu*, 185 F.3d at 938-39) (referring to the UCL and FAL); *see also Wiener v. Dannon Co.*, 255 F.R.D. 658, 670 (C.D. Cal. 2009) (providing that courts also have "'very broad' discretion to determine" damages under the CLRA); *Colgan v. Leatherman Tool G.T., Inc.*, 38 Cal. Rptr. 3d 36, 61 (Cal. Ct. App. 2006) (explaining that damages under the UCL and FAL "must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence"). Under California law, because restitution "damages may be computed even if the result reached is an approximation," *GHK Assocs. v. Mayer GT., Inc.*, 274 Cal. Rptr. 168, 179 (Cal. Ct. App. 1990), uncertain damages should not prevent class certification, B.W.I. Custom *Kitchen v. Owens-Illinois, Inc.*, 235 Cal.Rptr. 228, 237 (Cal. Ct. App. 1987) ("[W]e know of no case where [factual determinations of damages] ha[ve] prevented a court from aiding the class to obtain its just restitution.").

Lambert proposed measuring class wide damages under the full refund model. The full refund model measures damages by presuming a full refund for each

customer, on the basis that the product has no or only a de minimis value. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back."). Here, Lambert presented evidence that the product at issue was valueless and therefore amenable to full refund treatment. We agree with the district court that the full refund model is consistent with Lambert's theory of liability. Accordingly, Lambert was required only to show that the full price amount of retail sales of the product could be approximated over the relevant time period, even if that figure or the data supporting it – in this case the average retail price multiplied by the number of units sold – was uncertain.[9] *Leyva*, 716 F.3d at 514.

Although Lambert did not present evidence of the actual average retail price, he did present evidence of both unit sales and the suggested retail price over the relevant time period.[10] There may well be additional evidence that Lambert could present at trial to support

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[9] This is not to say that every case proceeding under a full refund theory must produce figures for the average price and unit sales of a product. As Lambert argued in his motion for class certification, point-of-sale data approximating the total retail expenditure would also be an appropriate method of calculating restitution on a worthless item. So, too, would evidence of the defendant's wholesale revenue, if reasonably capable of being weighed or adjusted by the trier of fact to account for possible difference between wholesale and retail values.

[10] Notably, the suggested retail price was cited as one of the original grounds for certifying the class.

an average retail price. For example, the record contains evidence that Lambert paid $16-$18 per 30-count bottle of the product and that Nutraceutical, through its website, sold 30-count bottles for $14.39 during this time frame. The suggested retail price in conjunction with Lambert's other evidence suggests that a trier of fact could calculate or sufficiently approximate the average retail price for the product.

We recognize that a suggested retail price does not "automatically configure an average," but such a precise average is unnecessary for class certification. At this stage, the question is only whether Lambert has presented a workable method. We conclude that he has.

Accordingly, because Lambert's damages model matched his theory of liability, and because Lambert had shown that his damages model was supportable on evidence that could be introduced at trial, the class should not have been decertified. The district court abused its discretion in holding otherwise, contrary to our law. *See Hinkson*, 585 F.3d at 1261-62 (holding that legal error is an abuse of discretion); *see also Pulaski*, 802 F.3d at 989; *Leyva*, 716 F.3d at 513-14; *Yokoyama*, 594 F.3d at 1094. Whether Lambert could prove damages to a reasonable certainty on the basis of his full refund model is a question of fact that should be decided at trial.[11]

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[11] Because we hold that Lambert showed damages sufficient to avoid decertification under the full refund model, we need not reach the question of whether he waived his non-restitutionary disgorgement argument, or whether that arguments fails on the merits.

V.

For the foregoing reasons, we conclude that Lambert's Rule 23(f) petition was timely, reverse the district court's order decertifying the class, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY LAMBERT, Plaintiff, NUTRACEUTICAL CORPORATION, Defendant.	Case No. ED CV 13-05942-AB (SPx) **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION** (Filed Jun. 24, 2015)

Pending before the Court is Plaintiff Troy Lambert's Motion for Reconsideration, (Motion, Dkt. No. 183), of the Court's order, (Order, Dkt. No. 175), granting Defendant Nutraceutical Corporation's Motion for Class Decertification. Defendant filed an Opposition and Plaintiff filed a Reply. (Dkt. Nos. 189, 192.) The Court took this matter under submission on April 23, 2015. (Dkt. No. 194.) For the reasons discussed more fully below, Plaintiff fails to satisfy the requirements for reconsideration, and the Court **DENIES** the Motion.

I. BACKGROUND

The full factual and procedural history of this litigation is familiar to the Parties. The case centers on a

product called Cobra Sexual Energy ("Cobra"), a dietary supplement. Defendant manufactures and markets Cobra. Plaintiff brought a consumer class action suit against Defendants for Violation of the Unfair Competition Law ("UCL"), Unlawful Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the UCL, Unfair and Fraudulent Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 *et seq.*); Violation of the Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*). (*See* Second Amended Complaint "SAC," Dkt. No. 56.)

In June 2014, the Honorable Audrey B. Collins granted Plaintiff's Motion for Class Certification under Federal Rule of Civil Procedure ("Rule") 23(b)(3). (*See generally* Dkt. No. 80.) The class was certified under Plaintiff's FAL, UCL, and CLRA theories and the theories were to be measured using the full refund damages model theory. (*Id.*) Judge Collins anticipated calculating damages using Defendant's sales data and an average retail price. (*Id.* at pp. 12-13.)

After the completion of discovery, Defendant moved for class decertification based on, *inter alia*, Plaintiff's inability to demonstrate a classwide calculation of damages using his evidence. (*See* Dkt. Nos. 111, 122.) The Court agreed with Defendant and granted its Motion. (*See* Order.) The Order only addressed the inadequacy of Plaintiff's damages model, which was dispositive of the entire question in decertifying class. (*See* Order.) After the Court entered judgment, Plaintiff moved for reconsideration.

II. LEGAL STANDARD

Generally, a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e). *See* Fed. R. Civ. Proc. 59(e) (motions to alter or amend judgment under that rule must be brought within 28 days of entry of judgment); *see also In re Benham*, No. CV 13-00205-VBF, 2013 WL 3872185, at *1 (C.D. Cal. May 29, 2013) ("A motion for reconsideration filed within 28 days of a judgment is typically treated as a motion under Federal Rule of Civil Procedure 59(e)."). "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). "For reasons of judicial economy and finality, such motions are disfavored and are rarely granted." *Resolution Trust Corp. v. Aetna Cas. & Sur. Co.*, 873 F. Supp. 1386, 1393 (D. Ariz. 1994)

Reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quotation omitted). A motion to reconsider may not "rehash[ ] what ha[s] been before the court when it ruled" on the prior motion. *Faysound Ltd. v. United*

Coconut Chemicals, Inc., 878 F.2d 290, 296 (9th Cir. 1989); *accord Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion."). Nor does reconsideration afford a party an opportunity to try out new arguments or evidence that it could have, but did not, discover or advance the first time around. *U.S. v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1130 (E.D. Cal. 2001); *United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D. Cal. 1997). Generally, the aim of reconsideration is to accommodate a fundamental change in circumstances going to the heart of a court's original analysis.

Alternatively, reconsideration may also be used as a narrow vehicle to correct a "clear" or "manifest" error of law or fact in a court's earlier ruling. *Roschewski v. Raytheon Co.*, 471 F. App'x 588, 589 (9th Cir. 2012) (citing *School Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, *supra*, 5 F.3d 1255, 1262-63 (9th Cir.1993). Although the Ninth Circuit has not yet articulated what constitutes a "clear" or "manifest" error for the purposes of reconsideration, other circuits have. As the Fifth Circuit has noted, "'clearly erroneous' is a very exacting standard. Mere doubts or disagreement about the wisdom of a prior decision . . . will not suffice for this exception. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must be dead wrong." *Hopwood v. State of*

Texas, 236 F.3d 256 (5th Cir. 2000) (internal quotes omitted); *see also Campion v. Old Republic Home Prot. Co.*, No. 09-CV-748-JMA NLS, 2011 WL 1935967, at *1 (S.D. Cal. May 20, 2011) (citing *Hopwood* and applying this standard on motion for reconsideration). Similarly, a "'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000); *see also Mays v. Colvin*, No. 1:13-CV-00904-SKO, 2014 WL 6893825, at *3 (E.D. Cal. Dec. 8, 2014) (citing *Oto* and applying this standard on motion for reconsideration).[1]

III. DISCUSSION

Plaintiff seeks reconsideration on the ground that the Court committed clear and manifest error in not considering Plaintiff's alternative disgorgement model. (*See* Mot.) According to Plaintiff, he properly proposed an alternative damages model to measure

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[1] In moving for reconsideration, Plaintiff seeks to treat this as a renewed motion for class certification under Rule 23. (Mot., p. 5 ("[R]ule that class certification orders are inherently tentative should govern over the general rule for motion for reconsideration.").) At the March 2, 2015 Status Conference, the Court already denied Plaintiff's request to file a renewed motion for class certification. (Dkt. No. 177, 5:6-20 ("[F]eel free to file your motion for reconsideration . . . [Defendant] will be looking very carefully to make sure that it is not a new motion [for class certification]. . . .").) Consequently, this Motion is discussed under the reconsideration standard and the Court does not conflate this standard with any other the legal standards.

restitution and the Court erred in not accepting this alternative.[2]

A. The Court Did Not Err in Rejecting Plaintiff's Full Refund Model and Did Not Ignore Plaintiff's *Newly* Proposed Disgorgement Model

Plaintiff argues that the Court failed to consider his alternative disgorgement model. (Mot., pp. 7-8, 10-11.) Plaintiff contends that this alternative damages model was proposed during the December 22, 2014 oral argument and was also presented in his Summary Judgment briefing. (Mot., p. 11 ("The Court.. erred in disregarding this model . . . which Plaintiff's counsel expressly brought to the Court's attention during oral argument[ ]. . . ."); Gregory Weston Declaration, Dkt. No. 187, ¶ 2.)

The Court stresses that a request to reconsider is not an opportunity to raise arguments or present evidence for the *first time* when one could have reasonably raised these contentions earlier in the litigation. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 887, 890 (9th Cir. 2000) (citing *389 Orange St.*, 179 F.3d at 665)

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[2] The Parties again focus their arguments on irrelevant issues – the materiality prong of Plaintiff's state law claims and the typicality prong under Rule 23. (Dkt. No. 80; *cf.* Mot., pp. 17-18; Opp., pp. 16-21, Reply, pp. 14-18.) The Court previously disregarded these identical arguments in its Order, and Plaintiff does not assert clear error in not addressing those arguments therein. (Order, p. 4 n. 1.). Consequently, the Court will not address these contentions within this discussion.

(emphasis added). Neither should the Court have to search other pleadings in the litigation to ascertain a party's arguments. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs" or oral arguments." (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991))).

As the Parties recall, Defendant moved to decertify class on various grounds, namely that Plaintiff's damages model was insufficient, and Plaintiff opposed the motion contending that his full refund damages model was sufficient using only Defendant's sales data. (Dkt. Nos. 111, 141.) The Court granted Defendant's Motion to decertify class because restitutionary damages could not be calculated using only Defendant's sales data. (Order, pp. 7-11.) Now, Plaintiff no longer rests his measurement of classwide damages on the full refund damages model – a model *he suggested* in certifying the class. (Dkt. No. 65, p. 22 ("Finally, not only is a full refund [model] of the purchase price . . . consistent with all of Plaintiffs' theories of liability. . . ."); *cf.* Dkt. No. 141, p. 10 ("As further explained below, Plaintiff's full refund damage model is consistent with his liability theory that Cobra is ineffective and illegal.").) The Court's Order did not address Plaintiff's alternative disgorgement model for the simple reason that Plaintiff did not propose this alternative disgorgement model anywhere in his opposition to decertify class or during oral argument. (*See generally* Dkt. No. 141; *see also* Dkt. No. 147 (the "Hearing").)

In reviewing Plaintiff's opposition to the motion to decertify class, it is abundantly clear that Plaintiff's newfound disgorgement model and arguments in support of that model were well outside the record before the Court. To the extent Plaintiff thought proposing this alternative model was material to opposing Defendant's motion for class decertification, he was free to make that contention in his opposition. He failed to do so. Only *now* does Plaintiff extensively cites to his papers in support of Summary Judgment. (Mot., pp. 10-11 (citing Dkt. No. 161 [Pl. Reply to Pl. Summ. J. Mot.] at 24-25; Dkt. No. 129 [Pl. Summ. J. Mot.] at 23-24).) First, these citations to his summary judgment motion and the reply brief are not mentioned anywhere in his opposition to decertify class. (*See generally* Dkt. No. 141.) Second, Plaintiff's assertion of clear error because the Court should have considered arguments *outside* of the four corners of his opposition to class decertification lacks legal support.[3] It is unreasonable for Plaintiff to expect the Court to extrapolate this alternative damages model from his Summary Judgment briefing. In effect, Plaintiff seeks to transform the Court into "the lawyer for [Plaintiff],

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[3] Plaintiff has every right to cite to evidence attached to a separate motion for summary judgment. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001) (noting on cross-motions for summary judgment, district court is required to review evidence filed in support of another motion so long as that evidence is "specifically identified in [the] moving papers."). But a party (Plaintiff) opposing a motion who wishes to have the court consider evidence cited in a separate motion for summary judgment must actually *cite* the evidence *in its opposition papers*. *Id.*

performing the lawyer's duty of setting forth specific [arguments]. . . ." *Carmen v. San Francisco Unified School Dist*, 237 F.3d 1026, 1031 (9th Cir. 2001) (considering whether a judge must consider materials outside the motion papers). It would have been "unfair" to the Court and "profoundly unfair" to Defendant to require the Court "to search the entire record for [arguments], even though [Plaintiff] [did] not set [them] out in the opposition papers." *Id.*; *in accord In re E.R. Fegert, Inc.*, 887 F.2d 995, 957 (9th Cir. 1989) (the "argument must be raised sufficiently for the trial court to rule on it.") (citation omitted); *Independent Towers*, 350 F.3d at 929 ("Our adversarial system relies on the advocates to inform the discussion and raise the issues to the Court.").

Plaintiff's next argument is that the Court "disregarded" this alternative damages model despite "Plaintiff's counsel expressly [bringing] [the alternative damages model] to the Court's attention during oral arguments." (Mot., p. 11 ¶ 2.) The Court's review of the hearing transcript reveals not one reference to the word "disgorgement" or "alternative." (*See* Hearing.) Plaintiff's counsel apparently suggests he had somehow proposed an alternative damages model when he cited the summary judgment briefing during oral argument.[4] (Weston Decl., ¶ 2.) Even if it had been

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[4] In highlighting a portion of the Hearing, Plaintiff's counsel declares that he "referred the Court to Plaintiff's Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment." (Weston Decl., ¶ 2.) Though it is true that Plaintiff did reference such briefs during oral argument, (Hearing,

proper to propose an alternative damages model at oral argument, the record reflects that Plaintiff did no such thing. Instead Plaintiff made a fleeting reference to his summary judgment papers without any reference to an alternative damages model. (*See generally* Hearing.) The Court's duty during oral argument is not to deduce arguments from implicit statements. *Independent Towers*, 350 F.3d at 929 ("The art of [oral] advocacy is not one of mystery."). To argue otherwise would be unreasonable.

Simply put, this is the *first time* Plaintiff has brought this alternative damages model to the Court's attention, and there is neither a single sentence in his opposition nor any reference made during oral argument regarding an alternative damages model. (*See* Dkt. Nos. 129, 141; *see also* Hearing.) In hindsight, Plaintiff may wish he had proposed an alternative damages model much earlier. *See, e.g.*, *Brown v. Hain Celestial Group, Inc.*, No. C 07-01882 JF (RS), 2010 WL 760433, at *1142 (N.D. Cal. 2010) (Proposing multiple damages models (dominant-firm and regression models) in a motion to certify class). But reconsideration is not an opportunity to take a second bite at the apple. *Campion v. Old Repub. Home Protection Co., Inc.*, No. 09- CV-00748-JMA(NLS), 2011 WL 1935967, at *1 (S.D. Cal. May 2011). It is an opportunity to correct the Court's error, not Plaintiff's. *FDIC v. Jackson – Shaw Partners, No. 46, Ltd.*, 850 F.Supp. 839, 845 (N.D. Cal. 1994) (motions for reconsideration "are not to be used

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7:20-23, 8:1-4, 17:11-25), the statements had nothing to do with any purported alternative damages model.

to test new legal theories that could have been presented when the original motion was pending.").

Accordingly, the Court finds that Plaintiff's failure to explicitly raise this newly proposed alternative damages model arguments in his opposition papers or oral argument amount to a waiver of this argument. *Moreno Roofing*, 99 F.3d at 343 (passing remarks on an issue in opposition to summary judgment were insufficient to avoid waiver); *U.S. v. George*, 291 Fed. App'x. 803, 805 (9th Cir. 2008) (holding party's "failure to adequately develop these arguments in his brief operates as a waiver"); *accord John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (the party "failed to develop any argument on this front, and thus has waived it"); *JustMed, Inc. v. Byce*, 580 Fed.Appx. 566, 567 (9th Cir. 2014) ("Because [Defendant] did not properly raise this argument before the district court . . . the argument is waived."); *US. v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (where party fails to "coherently develop[ ]" an argument on appeal "we deem it to have been abandoned").

But even if Plaintiff had not waived this argument and proposed this alternative disgorgement model within his opposition to class decertification, his alternative damages model still does not undermine the Court's reasoning.

B. The Undisputed Evidence Shows that Plaintiff Still Cannot Present a Viable Damages Model Under His *New* Disgorgement Model

The remainder of Plaintiff's Motion for Reconsideration concerns his alternative disgorgement model. (Mot., pp. 6-17.) Under this disgorgement model, Plaintiff contends that there was sufficient evidence to measure classwide restitutionary damages. (Mot., pp. 11-14.) Plaintiff's contention that the Court's ruling erred rests on several pieces of evidence.

1. Restitution and the Disgorgement Remedy

As a preliminary matter, it is necessary for the Court to address the appropriate standard of law in measuring restitution.

Under Plaintiff's theories of recovery, "[t]he False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants. . . ." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 694, 38 Cal. Rptr. 3d 36 (Cal. App. 2006) (citations omitted). Restitution is the only form of monetary relief under the UCL. *BizCloud, Inc. v. Computer Sciences Corporation*, Case No. C-14,00162 JCS, C-13-05999 JCS, 2014 WL 1724762, at *3 (N.D. Cal. 2014) (citations omitted). "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*,

29 Cal. 4th 1134, 1148, 131 Cal. Rptr. 2d 29 (Cal. 2003) (UCL case); *see also In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130, 103 Cal. Rptr. 3d 83 (Cal. App. 2010) (restitution available under FAL). "The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution." *Vioxx*, 180 Cal. App. 4th at 131, 103 Cal. Rptr. 3d 83.

In measuring restitution, some courts have utilized the remedy of disgorgement. There are two forms of disgorgement – restitutionary and non-restitutionary – the latter of which is not available under California law. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 40 (California Supreme Court stating that "[w]hile express authority to order restitution was added to the UCL, courts were not given similar authorization to order nonrestitutionary disgorgement."). Restitutionary disgorgement is limited to (1) money or property once in the plaintiff's possession and (2) money in which the plaintiff has a vested interest. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 41-42 ("Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.").

The distinction between restitutionary and non-restitutionary disgorgement turns on whether the money the plaintiff seeks is money that was originally obtained by the defendant from the plaintiff. *See, e.g.*, *Kraus v. Trinity Mgmt. Servs. Inc.*, 23 Cal. 4th 116, 126-27, 96 Cal. Rptr. 2d 485 (Cal. 2000) *superseded on other grounds, as recognized in Arias v. Superior Court*, 46

Cal. 4th 969, 95 Cal. Rptr. 3d 588 (Cal. 2009). If that is the case, the disgorgement is restitutionary in nature. *Id.* To the extent the plaintiff seeks to disgorge monies that were not taken from the plaintiff, such monetarily relief is nonrestitutionary and unavailable under the UCL. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 36-46.

2. Using Plaintiff's Methodology In Calculating the Average Retail Price Produces a Nonrestitutionary Disgorgement Model Which Is Impermissible Under California Law

Here, Plaintiff disputes the Court's underlying conclusion that failing to present an average retail price was fatal to his full refund damages model. (Mot., pp. 6-7.) Now, Plaintiff presents evidence to calculate an average retail price. (*Id.*) According to Plaintiff, a jury could determine the average retail price of Cobra using his suggested retail prices. (*Id.*) The suggested retail prices derive from (1) Defendant's product guides that are distributed to its retailers, (2) Plaintiff's deposition, and (3) Defendant's website where it sells Cobra directly to consumers. (*Id.*) Plaintiff claims that a quantifiable sum can be calculated using any of these retail prices. (*Id.* at pp. 14-15 (citing to Pl. Summ. J. Briefing).) Although the retail prices have fluctuated over time, Plaintiff contends that the prices have continued to stay consistent with one another. (*Id.* at p. 6 ¶¶ 4-5, Weston Decl. Exs. 1-4 (since 2009, the suggested retail prices from Defendant's product guides

vary from $13.79 for a 30 count bottle, between $23.79 to $24.29 for a 60 count bottle, and between $35.39 to $ 36.19 for a 120 count bottle).)[6] According to Plaintiff, the prices need not be exact and are in fact adequate for a jury to ascertain an average retail price. (*Id.* at p. 7 ¶ 1.) Although a quantifiable sum can be calculated using these prices and restitution need not be precisely measured at this stage, the *newly* presented evidence is unreliable and renders the alternative disgorgement model nonrestitutionary in nature.

First, in examining the suggested retail prices in Defendant's product guides, (Weston Decl., Exs. 1-4.), the Court finds such evidence to be unreliable in determining the average retail price. As the Court discussed in its prior ruling, the prices wholesalers suggest to its retailers are not the prices at which retailers sell the product. (*See* Order, p. 10 (citing *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 32 80 S.Ct. 503, 506 4 L.Ed.2d 505 (1960) ("[D]rug retailers in the two cities advertised

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[6] Again, this evidence Plaintiff relies on for this proposition is nowhere to be found in any of his opposition to decertify class. (*See generally*, Dkt. No. 141.) Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration. Local Rule 7-9 (The opposing party shall file "the evidence upon which the opposing party will rely in opposition to the motion and a brief but complete memorandum which shall contain a statement of all the reasons in opposition thereto and the points and authorities upon which the opposing party will rely. . . ."); *cf.* Local Rule 7-18 ("A motion for reconsideration of the decision on any motion may be made only on the grounds . . . (c) a manifest showing of a failure to consider material facts presented to the Court *before* such decision.").

and sold several [ ] vitamin products at prices substantially below the suggested minimum retail prices.").) In his Reply, Plaintiff appears to challenge the assertion that retailers set their own pricing for the products they receive from wholesalers. (Reply, pp. 5-6.) Because there is no evidence of an example where a vendor marked Cobra's suggested retail price up or down, Plaintiff seeks to move forward under the assumption that vendors accept the price suggestions within the product guides and do not make any price adjustments whatsoever. (*Id.*) Plaintiff's logic is flawed. Retailers have the ability to set their own prices (mark-up or mark-down) for the products they buy from the wholesalers because that is how retailers make a profit. *F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("[Defendant] sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups."). The same can be said about Defendant and the vendors who sell Cobra. (*See* Dkt. No. 111, Ex. H., 144:17-21, Jeffery A. Hinrich's Transcript ("The retailer sets their own pricing. [Defendant has] a price that [Defendant sells] to the retailer [at]. [Defendant does] not know what [the retailer] will do with that price . . . what [the retailer] will put as a markup once [the retailer receives] the product.").); *in accord Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PHI, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014) (denying class certification because, *inter alia*, plaintiff provided no evidence to account for the "prices in the retail market [that] are affected by the nature and location of the outlet in which [the product] [is] sold.") (citation omitted). Plaintiff's use of these

suggested retail prices fails to take into account the retailer's discretion which is why the Court expects Plaintiff to collect data and present an average retail price.

Second, using Plaintiff's deposition as a basis to calculate an average retail price is not only unreliable but illogical. Defendant contends that Plaintiff's deposition is unreliable because of the inconsistency in Plaintiff's statements. In his complaint, Plaintiff states that he bought Cobra at a local Rite-Aid for about "$16$17" which is inconsistent with Plaintiff's deposition where he recalls buying Cobra for about "$16-$18." (Dkt. No. 189 ("P1. Depo."), 40:25; *cf.* Dkt. No. 56 (Second Amended Complaint), ¶ 18.) Plaintiff's inconsistencies are evident, but the Court is more concerned with the illogical request Plaintiff asks of the jury. For Plaintiff to ask a juror to determine the average retail price based on one particular value a vendor (Rite-Aid) used in selling Cobra makes no sense. As mentioned earlier, retailers have discretion in setting prices for their products which is why a product's price varies from vendor to vendor. Plaintiff's recollection of *one* price at Rite-Aid in 2012 represents only *one* piece of the puzzle in formulating an *average* retail price. The Court expects an *average* retail price, not *one* retail price.[6]

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[6] To the extent Plaintiff simply seeks to use Plaintiff's deposition as evidence of the consistency in value between these three sets of prices, the Court still is not persuaded. There is a clear inconsistency between Plaintiff's testimony and his complaint. (Pl. Depo. 40:25; *cf.* Second Amended Complaint, ¶ 18.) Plaintiff

Third, using Defendant's website where it sells Cobra directly to consumers is, as Defendant argues, rife with problems. (Opp., pp. 5-7.) This is the price Defendant (not the retailers) utilizes in selling Cobra to consumers. Defendant has already stated that it rarely sells Cobra through its website. (Hinrichs Decl., Dkt. No. 189-5, ¶ 3 (stating that since 2009, 44 bottles of Cobra have been sold through Defendant's website).) More importantly, Plaintiff does not seek to disgorge profits from Defendant's direct sales to consumers. If Plaintiff sought to disgorge those profits, then an average retail price would be unnecessary because Defendant's direct sales to consumers are profits that Plaintiff and class members have an ownership interest in. But, Plaintiff does not seek to disgorge profits from Defendant's direct sales to consumers. Instead, Plaintiff seeks to disgorge profits from Defendant's sales to the retailers. This is inappropriate under California law because Plaintiff and the class members do not have an ownership interest in Defendant's sales to third party vendors.[7] *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th

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has not produced a receipt or any other concrete documentation to support his statements, (Pl. Depo., 41:6-7.), yet he seeks to use this price he remembers (from purchasing Cobra in 2012) as evidence within his damages model. Because of the inconsistences and lack of evidentiary proof regarding this price, the Court does not consider such evidence as being consistent with the other suggested retail prices.

[7] The Court agrees with Plaintiff on one point. (Reply, p. 8 ¶ 2.) Defendant does not walk away free from liability because it never sold Cobra directly to consumers. Nor is Plaintiff required to sue all of the retailers who sold Cobra directly to consumers. What the Court is saying is that Plaintiff needs both pieces of evidence under this model – Defendant's sales to its retailers and

440, 455-462, 30 Cal. Rptr. 3d 210 (Cal. App. 2005) ("Plaintiff's generalization fails to acknowledge the specific limitation applicable in the UCL context – that restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it.") (citation omitted). Rather, the class members have an ownership interest in the retail sales, *i.e.*, amounts they paid directly to the retailer. (*See* Order, p. 8.) This is why an average retail price is so essential because it is the sole variable to which Plaintiff and the class members have an ownership interest in. Defendant's website prices do not reflect the ownership interest class members have in Cobra's retail profits and to allow Plaintiff to use this data as a means to calculate an average retail price would be improper. *Lee Myles Assoc. Corp. v. Paul Rubke Enter., Inc.*, 557 F.Supp.2d 1134, 1144 (S.D. Cal. 2008) ("Disgorgement of profits earned by defendants as a result of allegedly unfair practices, where the money sought to be disgorged was not taken from the plaintiff and the

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the average retail price used in selling Cobra – to bridge the gap between Defendant's gains and Plaintiff's ownership interest within those gains. *Johns v. Bayer Corp.*, Civil No. 09-CV-1935-AJB (DHB), 2012 WL 1520030, at *4 (S.D. Cal. 2012) ("because [Defendant's] profits for its Men's Vitamins would seemingly have originated from the class members' purchases of the products, Plaintiffs contention that they are seeking restitutionary disgorgement of Bayer's profits is arguably accurate." But "it is for the District Judge to determine which measure of restitution is appropriate in this case . . . " and Plaintiffs' duty is to obtain "the evidence which supports a theory of restitutionary disgorgement. . . .").

plaintiff did not have an ownership interest in the money, is not authorized.").

Ultimately, Plaintiff's alternative disgorgement model and the accompanying retail price suggestions do not address the previously highlighted impasse – the inability to calculate restitution.[8] (Order, p. 11.) For the reasons stated above, the Court concludes that Plaintiff's *new* evidence is insufficient. And since the discovery deadline has lapsed, Plaintiff must again

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[8] Even assuming *arguendo* that such retail prices are appropriate in measuring restitution, Plaintiff leaps to the conclusion that a jury could somehow determine an average retail price using these set of numbers. (Mot., pp. 6-7; *cf.* Opp., p. 9.) In his Reply, Plaintiff states that the jury would weigh the evidence (the suggested retail prices) and then determine for itself what it believes the actual retail price is. (Reply, pp. 6-7 n.1.) Plaintiff continues to claim that the calculations will not be difficult, simply multiply the average retail price by the number of bottles sold using Defendant's sales data. (*Id.*) But Plaintiff ignores the question of how picking one suggested retail price (one price for each bottle count) automatically configures an *average*.

Judge Collins and this Court expected Plaintiff to produce an *average* retail price under this damages model, but Plaintiff's evidence does not reflect a set of retail values of Cobra that typify a set of various vendors. For example, the prices within Defendant's product guides are in fact *suggestions* made to retailers. No evidence demonstrates that these suggested prices match the prices various retailers set for Cobra. The Court recognizes that calculating damages need not be exact or "mathematically precise" at this stage, but the Court will not ignore Plaintiffs speculative approach in relying on price suggestions within a product guide as a basis to determine an average retail price. *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without *undue speculation*.") (emphasis added).

solely rely on Defendant's sales data, which the Court has already considered and found insufficient in calculating restitution. (*See* Order (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone.").) Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously mentioned, Plaintiff and his class members do not have an ownership interest in those sales. To move forward with only one of these variables (Defendant's sales data) undermines the purpose of restitution and the requirement of having an ownership interest in the disgorged profits. *Shersher v. Superior Court*, 154 Cal. App. 4th 1491, 1499, 65 Cal. Rptr. 3d 634 (2007) (*Korea Supply* only requires "that the plaintiff must be a 'person in interest' (that is, the plaintiff must have had an ownership interest in the money or property sought to be recovered).") (citing *Korea Supply*, 131 Cal. Rptr. 2d at 41).

Plaintiff continues to argue that the Court is being too restrictive in applying restitution. (Mot., pp. 12-13.) The definition of restitution is clear-cut, and courts will only award class-wide restitution when it "serves to provide what the class members lost, not what the [d]fendant gained" unless the class members have an ownership interest in defendant's gains. (*See* Order, p. 8 (citing *Astiana*, 2014 WL 60097, at *12-13); *see also Korea Supply Company*, 131 Cal. Rptr. 2d 29, 35-46. Plaintiff is attempting to evade the requirements

under this definition. The problem with Plaintiff's evidence and his reoccurring arguments is that he seeks an award of monies that exceed his ownership interest. Moreover, Plaintiff's arguments that equitable principles favor his disgorgement model are equally unpersuasive. (Mot., pp. 15-16.) For Plaintiff to argue in favor of equitable principles on one hand but then request the Court to compromise on such equitable requirements on the other hand is inconsistent. In any case, such a contention is ineffective because Plaintiff's model fails to restore class members back to the status quo. *Korea Supply*, 131 Cal. Rptr. 2d at 41. Amidst his equitable policy considerations and other unpersuasive contentions, Plaintiff cannot avoid what is clear – his measurement of restitution does not meet the *Korea Supply* threshold. *Johns*, 2012 WL 1520030 at *4 ("[D]isgorgement is available to the extent it is restitutionary.") (citations omitted).

Plaintiff's continued attempt to manipulate his evidence to satisfy a restitutionary measurement is obvious. If Plaintiff's goal is to move forward with an adequate damages model, Plaintiff could have achieved that goal any time since June 2014 when Judge Collins certified this class action. (Dkt. No. 80.) From the moment the class was certified, Plaintiff was well aware of Judge Collins's expectation (an expectation of an average retail price). (*Id.*) As discovery proceeded, the responsibility of obtaining evidence to "readily calculate[] [classwide restitution] using Defendant's sales numbers and an average retail price" rested squarely on Plaintiff. (Dkt. No. 80, p. 13.) He choose not

to gather the data to formulate an average retail price and has since (until now) failed to propose an alternative damages model.

Accordingly, Plaintiff's arguments (new and old) have not changed the Court's stance, thus, the Court will not disturb its previous ruling.

C. Class Notice

Finally, Plaintiff argues that the Court's Order is defective because it did not address the issue of class notice upon decertifying class. (Mot., pp. 19-20.) Again, this is an argument that Plaintiff failed to set forth in his opposition to class decertification. That is sufficient grounds to disregard this contention under the reconsideration standards. *Independent Towers*, 350 F.3d at 929.

Irrespective of that standard, Plaintiff is correct that class members must receive notice following class decertification, but it is Plaintiff's duty to address and bear the cost of class notice, not the Court. *See Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002) (recognizing that the plaintiff bears the cost of class notice following decertification); *see also Radmanovich v. Combined Ins. Co. of America*, 271 F.Supp.2d 1075, 1078 (N.D. Ill. 2003) (plaintiff bringing forth a motion for class notice under Rule 23(e) following a denial of class certification) (citing *Culver*, 277 F.3d 908); *Barner v. City of Harvery*, No. 95 C 3316, 2004 WL 20920009, at *7 (N.D. Ill. 2004) (granting plaintiff's request for class notice following a class decertification) (citing

Culver, 277 F.3d 908). The Court's duty is to oversee the dissemination of class notice. Furthermore, Plaintiff argues that Defendant's decertification motion was defective for not providing a plan for class notice, but Plaintiff fails to recognize that this is *his* class action and he is responsible for bearing the costs of class notice when class is certified and decertified. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class."). Class notice is the responsibility of Class Counsel.

Accordingly, the Court disagrees with Plaintiff and does not reconsider its ruling based on his final argument.

IV. CONCLUSION

In light of the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration. Plaintiff does not identify any new evidence or law that it could not have, with reasonable diligence, presented to the Court in his opposition papers. Nor does Plaintiff identify any material evidence or authorities cited in his opposition papers that the Court ignored or disregarded such that the Court can be said to have committed clear or manifest error.

Furthermore, the Court **ORDERS** Plaintiff to file a proposed notice with respect to class decertification no later than twenty-one (21) days following the issuance of this Order. Plaintiff will bear the cost of class notice. *Culver*, 277 F.3d at 915.

This case shall move forward with Summary Judgement and Trial. Because the Court previously vacated all dates, (Mt. No. 178), a status conference is scheduled for July 27, 2015 at 10:00 am to reset dates and discuss the possibility of supplemental Summary Judgment briefing considering this ruling.

IT IS SO ORDERED.

Dated: June 24, 2015

/s/ Andre Birotte Jr.
HONORABLE ANDRÉ
BIROTTE JR.
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TROY LAMBERT, Plaintiff, v. NUTRACEUTICAL CORPORATION, Defendant.	Case No. CV 13-05942-AB (Ex) **ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION** (Filed Feb. 20, 2015)

Pending before the Court is Defendant Nutraceutical Corporation's Motion for Class Decertification. (Mot., Dkt. Nos. 111, 122.) Plaintiff Troy Lambert filed an Opposition and Defendant filed a Reply. (Opp., Reply, Dkt. Nos. 141, 144.) A hearing was held on December 22, 2014. (Dkt. No. 147.) Having considered the materials submitted and the oral argument presented at the hearing, the Court hereby **GRANTS** the Motion.

I. BACKGROUND

This consumer class action involves a dietary supplement called Cobra Sexual Energy ("Cobra"). (*See* Second Amended Complaint "SAC," Dkt. No. 56.) Defendant manufactures and markets Cobra. (*Id.*) "Defendant's product Cobra primarily consists of a 'proprietary blend' of small amounts of extracts from herbs, roots, [] other organic substances . . . " and other plant-based materials. (*Id.* at ¶¶ 26-30.) From May 2011 through December 2011, on numerous occasions,

Plaintiff bought Cobra from different locations in California. (*Id. at* ¶ 15.) Plaintiff contends that Defendant "falsely market[s] [Cobra] as having beneficial health and aphrodisiac properties and being scientifically formulated to improve virility, despite that none of the ingredients in Cobra, individually or in combination, provide such benefits." (*Id.* at ¶ 1.)

On March 14, 2013, Plaintiff filed a class action complaint against Defendant alleging the following: Violation of the Unfair Competition Law ("UCL"), Unlawful Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the UCL, Unfair and Fraudulent Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 *et seq.*); Violation of the Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*). (*Id.*)

On June 19, 2014, this Court certified Plaintiff's class action. (Dkt. No. 80.) The class is defined as: **All persons (excluding officers, directors, and employees of [Defendant]) who purchased, on or after August 14, 2009, [Defendant's] Cobra Products (in all packaging sizes and iterations) in California for their own use rather than for resale or distribution.** (*See* Dkt. No. 83 (emphasis in original)).

Now that discovery is completed, Defendant moves for class decertification under Federal Rule of Civil Procedure ("Rule") 23. Plaintiff opposes decertification on several grounds.

II. LEGAL STANDARD

Rule 23 governs class certification in federal court. Fed. R. Civ. P. 23. Although it is not an express component of Rule 23, "courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Zeisel v. Diamond Foods, Inc.*, C 10-01192 JSW, 2011 WL 2221113, at* 6 (N.D. Cal. June 7, 2011). A district court's decision to decertify a class is committed to its sound discretion. *See Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 816 (9th Cir. 1997). The standard used in reviewing a motion to decertify is the same as the standard used in evaluating a motion to certify. A district court "must conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996) (citing *In re American Medical Sys.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996)).

A court may choose to decertify a class on a party's motion or *sua sponte* at any time after the court conditionally certifies the class. Fed. R. Civ. P. 23(c)(1). Even on a motion to decertify, the party seeking to maintain class certification bears the burden of demonstrating that the Rule 23 requirements are satisfied. *Marlo v. U.P.S.*, 639 F.3d 942, 947 (9th Cir. 2011).

Based on discovery or other developments, a party may move to decertify the class on the basis that the prerequisites and grounds for certification do not exist. *See Pierce v. County of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008); *Owner-Operator Independent Drivers*

Ass'n, Inc. v. Landstar System, Inc., 622 F.3d 1307, 1326 (11th Cir. 2010) (concluding that decertification was appropriate where the court ultimately determined that damages cannot easily be calculated for all class members).

III. DISCUSSION

This Court certified this class action under Rule 23(b)(3). (Dkt. No. 80, p. 16 ¶ 1.) Rule 23(b) states that a court may certify a class if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members. . . ." Fed. R. Civ. P. 23(b)(3). "A court must decide 'whether there are so many questions common to all of the plaintiffs that having class action treatment would be far more efficient than having a number of separate trials.'" *Slaven v. BP America, Inc.*, 190 F.R.D. 649, 657 (C.D. Cal. 2000) (citation omitted).

Defendant moves to decertify the class on the ground that individual issues predominate over common issues. Most importantly, Defendant argues that Plaintiff's full refund model fails because it does not satisfy the *Comcast* common methodology test, and because Plaintiff failed to obtain the evidence necessary to calculate damages. (Mot., pp. 11-14 (citing *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1430, 185 L.Ed.2d 515 (2013)). Plaintiff opposes Defendant's Motion, arguing that Plaintiff's proposed damages methodology is consistent with his theories of liability. (*See* Opp., pp. 12-15.)

The Court finds that class decertification is warranted because although Plaintiff's full refund model is consistent with his theories of liability, Plaintiff has not presented enough evidence to demonstrate that classwide damages can be measured.[1]

1. Plaintiff's Theory for Measuring Damages is Consistent with Plaintiff's Theories of Liability

The class was certified under Plaintiff's FAL, UCL, and CLRA theories and the theories were to be measured using the full refund damages model theory, which would be "readily calculated using Defendant's sales numbers and an average retail price." (*See* SAC; Dkt. No. 80, p. 13.)

a. The Legal Standard for Classwide Damages

To maintain a class under Rule 23(b)(3), a plaintiff must demonstrate that damages are measurable on a classwide basis through use of a "common methodology." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1430,

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[1] The Court finds that the issue pertaining to the full refund model is dispositive and therefore need not reach the remaining issues involving the reliance and materiality prongs of Plaintiff's state law claims. (*See* Mot., pp. 5-11; Opp., pp. 2-10.) Because the Court certified this class under Rule 23(b)(3), the Court will not reach the Parties' arguments addressing certification under Rule 23(b)(2). (*See* Mot., pp. 15-16; Opp., pp. 15-17.) The deadline to certify the class under Rule 23(b)(2) has passed pursuant to Local Rule 23-3.

185 L.Ed.2d 515 (2013); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) ("[a]t class certification, plaintiff must present a likely method for determining class damages. . . ."). In order to certify a class, plaintiff's damages model must be consistent with the theory of liability against a defendant. *Id.* at 1433-34. In *Comcast*, the Supreme Court conducted a "rigorous analysis" of the Rule 23(b)(3) predominance requirement and concluded that the plaintiff "failed to establish that damages could be measure[d] on a [classwide] basis" because the common methodology in measuring damages was in excess of the liability theories asserted. *Id.* at 1431-32.

b. Plaintiff's Claims Seek Classwide Damages Under the Full Refund Model

Plaintiff's claim under the FAL is defined to include any statements, pictures, or labels made in connection with the sale of goods or services that is likely to deceive the reasonable consumer. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). A UCL action defines unfair competition to "mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." *See* Cal. Bus. & Prof. Code § 17200; *see also In re Tobacco II Cases*, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559 (Cal. 2009). Under the CLRA, a defendant is liable if it misrepresents its goods to contain certain characteristics, uses, or benefits that the goods do not

have or advertises goods intending not to sell them as advertised. Cal. Civ. Code § 1770(a)(5), (7), (9) and (16).

Plaintiff seeks restitution under these claims. "The False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 694, 38 Cal. Rptr. 3d 36 (Cal. App. 2006) (citations omitted). "The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923, at *8 (N.D. Cal. 2014) (citation omitted). Restitution is determined by "taking the difference between the market price actually paid by consumers and true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices." *Werdebaugh*, 2014 WL 7148923, at *8.

Plaintiff uses the full refund model to measure restitution. The full refund model assumes the class members did not benefit from the product at issue, and therefore are entitled to a full refund. *In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *3 n.2 (C.D. Cal. Mar. 25, 2014) ("[T]he Full Refund model depends upon the assumption that not a single consumer received a single benefit. . . ."); *cf. In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (Cal. App. 2009) ("The difference between what the plaintiff paid and the value of what the plaintiff received is a

proper measure of restitution."). For a damages model such as this, "[c]alculations need not be exact." *Comcast*, 133 S.Ct. at 1433.

c. Plaintiff's Damages Model Matches His Theories of Liability

Defendant contends that this full refund model does not match Plaintiff's claims because it fails to account for the benefit that some class members got from Cobra. (Mot., p. 11 (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014)); *In re POM*, 2014 WL 1225184 at *3 n.2. Defendant argues that its experts and Leslie Garvin's declaration establish that at least some class members received a benefit from Cobra, which renders the full refund model inapplicable on a classwide basis. (*See, e.g.*, Leslie Garvin Declaration, Dr. Eli Seggev Report, Dr. Eric Gershwin Report, Dkt. Nos. 111-1, 111-5, 111-8.) As a result, Defendant asserts that Plaintiff's damages model exceeds his liability theories and is not a valid "common methodology," making individual issues predominate over common issues. *Comcast*, 133 S.Ct. at 1431. Plaintiff has presented evidence supportive of his principal theory that Cobra is valueless. (*See, e.g.*, Dr. George E. Belch Report, Dr. David L. Rowland Report, Opp., Exs. 1, 2, (stating, *inter alia*, that Cobra's ingredients are ineffective and unreliable for sexual enhancement purposes)).

The Court finds that Plaintiff's full refund damages model matches his theories of liability. Plaintiff

claims that Cobra is valueless, and Plaintiff has produced evidence that supports his claim. If the finder of fact finds that Cobra is in fact valueless then that justifies fully refunding the class for their purchases. *In re POM*, 2014 WL 1225184, at *3 n.2 ("[T]he Full Refund model depends upon the assumption that not a single consumer received a single benefit . . . from Defendant's [products].").

2. Class Decertification is Warranted Because Plaintiff Cannot Demonstrate a Classwide Calculation of Damages

The Court certified this class under Rule 23(b)(3) based on Plaintiff's representations regarding the full refund model. Based on these representations, the Court anticipated calculating damages using Defendant's sales data and an average retail price. (Dkt. No. 65, pp. 20-21 ("Thus, using the average suggested retail sales price for [Cobra], which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class.")). However, Plaintiff has not produced an average retail price or any other point-of-sale data to support his damages model. Instead, Plaintiff uses Defendant's sales data and unit sales as the only means of calculating damages. (Opp., p. 14; *cf.* Dkt. No. 65-2, Exs. 5-6.) Defendant argues that its sales data by itself cannot be used to calculate damages under Plaintiff's full refund model, and without the average retail price, no restitution can be calculated.

The average retail price is essential in this action. Normally, under the UCL full restitution standards, restitution is calculated by taking the average market price the consumer actually paid and deducting it from the true market price. *Werdebaugh*, 2014 WL 7148923, at *8 (citation omitted) Courts routinely require the use of an average retail price to calculate damages. *Chambers v. CVS Pharmacy, Inc.*, No. 09cv0419 JAH(RBB), 2009 WL 2579661, at *3 (S.D. Cal. 2009) (using the average retail price of $2.45 to determine that the plaintiff's causes of action could not exceed minimum amount in controversy required for diversity jurisdiction); *OS Enterprise, LLC v. Fairline Development Canada (1992) Ltd.*, No: C 11-4375 SBA, 2014 WL 1389540, at *3 (N.D. Cal. 2014) (accepting the magistrate's default judgment recommendation which calculated Plaintiff's lost profits using an average retail price of $13.00 per bird for the chicken brand).

In this context, the price Defendant sold Cobra to its wholesalers does not reflect the price class members actually paid. It is the average retail price that reflects the price class members actually paid. Obtaining the average retail price does not require Plaintiff to determine the individualized price each consumer spent. Instead, the average retail price is a standard amount each class member would be refunded based on the retail information gathered through discovery. Although the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation. Missing this calculation is a defect in Plaintiff's evidence that is fatal to his class claims because

restitution serves to provide what the class members lost, not what the Defendant gained. *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097 at *12-13 (N.D. Cal. Jan. 7, 2014) ("Restitutionary relief is an equitable remedy, and its purpose is 'to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.") (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149, 131 Cal.Rptr.2d 29 (Cal. 2003)).

Plaintiff stated that he would use the average retail price to calculate damages and proposed no alternative method. (Dkt. No. 65, pp. 20-21.) However, during oral argument, it became clear that Plaintiff could only provide Defendant's own sales data and could not provide an average retail price. (Dkt. No. 147, 8:21-25; 9:7-10 ("Q: Help me understand how you're going to calculate the average retail price of this product." A: "Well, we have – what we had is we had the sales information for almost the entire class but not quite the whole class, and we took that . . . The UCL allows restitution of all funds received by way of unfair competition. And the defendants have told us what funds they received as a result of unfair competition.")).

Plaintiff already produced Defendant's sales data at the certification stage, which the Court relied upon in granting class certification based on Plaintiff's representations that he would supplement Defendant's sales data with the average retail price. (Dkt. No. 80, p. 13.) Now discovery is closed, and Plaintiff seeks to establish monetary relief on a classwide basis through

Defendant's sales data only. Yet, without the average retail price, classwide damages cannot be calculated. *Caldera*, 2014 WL 1477400 at *4 ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone."); *Astiana*, 2014 WL 60097 at *12-13 (denying class certification because, *inter alia*, plaintiff provided no evidence regarding damages, and that "[e]stablishing a higher price for a comparable product would be difficult because prices in the retail market differ and are affected by the nature and location of the outlet in which they are sold").

Plaintiff claims that damages can be calculated based solely on Defendant's sales data but does not explain how to do so without the average retail price. (Opp., p. 14; *cf.* Dkt. No. 65-2, Exs. 5-7; Dkt. No. 147, 37:11-19.) The Court understands that the theory behind Plaintiff's claims is that consumers are not receiving any benefit because Cobra is illegal; therefore, restitution is warranted using a full refund model. However, Plaintiff has not provided the Court with a damages expert or any affirmative evidence as to how this restitutionary calculation will be achieved come trial. Absent any retail data that would identify the actual class injury, the Court could only speculate as to the extent of any classwide injury using only Defendant's sales data. For instance, retailers set their own pricing for Cobra, marking the prices up or down. (*See* Dkt. No. 111, Ex. H., 144:17-21, Jeffery A. Hinrich's Transcript ("The retailer sets their own pricing. [Defendant has] a price that [Defendant sells] to the retailer [at]. [Defendant does] not know what [the

retailer] will do with that price . . . what [the retailer] will put as a markup once [the retailer receives] the product."); *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 32 80 S.Ct. 503, 506 4 L.Ed.2d 505 (1960) ("[D]rug retailers in the two cities advertised and sold several [] vitamin products at prices substantially below the suggested minimum retail prices."); *see also F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("[Defendant] sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups."). Because of the discrepancy in retail pricing, Defendant's sales data or what Defendant charges its wholesalers cannot be a substitute for the average retail price.

Plaintiff contends that the average retail price is unnecessary because individual damage calculations alone do not defeat class certification. (*See* Opp., pp. 10-11 (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)). In *Leyva*, the Ninth Circuit held that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." (*Id.*) In justifying this position, the appellate court understood that within a wage and hour context, a class of aggrieved employees may very well have individualized damages owed to them because not every class member gets paid the same rate or works the same amount of hours. Thus, "so long as the damages can be determined and attributed to a plaintiff's theory of liability, damage calculations for individual class members do not defeat certification." *Lindell v. Synthes USA*, No. 11-CV-02053-110-BAM, 2014 WL 841738, at

*14 (E.D. Cal. Mar. 4, 2014) (citing *Leyva*, 716 F.3d at 514).

Leyva is distinguishable. In *Leyva*, individualized damage calculations did not defeat certification because the plaintiffs had a workable damages model that matched their theory of liability. In the instant case, there simply is no evidence to calculate damages under Plaintiff's damages model is what stops the analysis. The absence of an average retail price makes it impossible to calculate damages either classwide or on an individual basis. Thus, the Court is presented with a full refund model that relies exclusively on Defendant's sales data, and that evidence alone does not suffice to calculate damages.

After a full opportunity to conduct discovery, Plaintiff has failed to produce the evidence needed under the full refund model. Moreover, Plaintiff has not presented an alternative damages model to address this impasse. The Court cannot allow this class to move forward if the damages model cannot be applied. *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006) (denying certification because the plaintiffs' damages analysis was incomplete and defective).

Accordingly, because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3). Therefore, class decertification is warranted.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Decertify Class is GRANTED.

IT IS SO ORDERED.

Dated:
February 20, 2015

/s/ Andre Birotte Jr.
HONORABLE
ANDRE BIROTTE JR.
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY LAMBERT, on Behalf of Themselves and All Others Similarly Situated, Plaintiff-Appellant, v. NUTRACEUTICAL CORP., Defendant-Appellee.	No. 15-56423 D.C. No. 2:13-cv-05942-AB-E Central District of California, Los Angeles ORDER (Filed Nov. 3, 2017)

Before: PAEZ, BERZON, and CHRISTEN, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION HONORABLE ANDRE BIROTTE, JR., U.S. DISTRICT JUDGE

FRANK ORTEGA AND TROY LAMBERT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, vs. NUTRACEUTICAL CORP., A DELAWARE CORPORATION, DEFENDANT.	No. CV 13-05942-AB-EX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, MARCH 2, 2015

10:10 A.M.

LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA;
MONDAY, MARCH 2, 2014

[3] 10:10 A.M.

THE CLERK: Calling Item Number 3, CV 13-5942-AB, Frank Ortega, et al., versus Natural Balance, et al.

Counsel, please step forward and state your appearances.

MR. WESTON: Good morning, Your Honor. Greg Weston for the plaintiffs.

THE COURT: Good morning.

MR. HUESTON: Good morning, Your Honor. John Hueston and Steve Feldman of Hueston Hennigan for defendant, Nutraceuticals.

THE COURT: Good morning. If I understand correctly, we are here on a status conference. Obviously, the Court – I assume the parties have received the motion with respect to the decertification.

I guess the question – the first question that comes to mind, in light of that motion – I'm curious as to the parties' position whether or not this Court still has jurisdiction based on that because at least looking at – I think the last filing was the Second Amended Complaint. There was a – there may be – there exists diversity jurisdiction, but, looking at paragraph 18, it appears that [4] Mr. Lambert purchased the item approximately ten times at about $17 per bottle.

I wonder if we've reached the monetary amount. So I would be curious as to the parties' view relative to that.

MR. WESTON: Your Honor, my understanding is that diversity jurisdiction under the Class Action Fairness Act is established at the time the Complaint is filed based on the Complaint's allegation and the Court does not lose jurisdiction by denying class certification.

THE COURT: Is that your understanding, Mr. Hueston? I suspect you might have a different view.

MR. HUESTON: Well, the case law is actually not 100 percent clear on this. I do think the case law leans in favor of retained jurisdiction. We'll do a little more thinking on that, but I don't think there is a clear basis at this point.

THE COURT: All right. And then I guess moving forward – we vacated the trial date. I have some proposed dates, but I guess the question in my mind is have the parties talked in light of the ruling? Is there any opportunity or possibility for settlement in this matter? Or are we ready to proceed for trial?

MR. WESTON: Your Honor, I believe I would like to ask the Court now if we could have leave to file a renewed motion for class certification. And the reason is we do [5] have a damages model and support for it.

At the time that we filed our initial motion, we proposed a model and then later not all the facts that we needed to support that model came through the discovery process simply because it wasn't available in terms of the retail prices.

However, we can show in a renewed motion that there is very strong support in California law for a model based on the data we do have, which is the defendant's wholesale data. And that was the sole reason the Court decertified the class. And I think this is something that we could do in five pages, assuming we don't need to brief any other issues. And that would –

THE COURT: Let me let me ask you this, Mr. Weston: Where was this evidence before? I mean, is this something that's new that you just came up upon? Help me understand.

MR. WESTON: Well, we did point to it both in our summary judgment brief and in our opposition to the motion to decertify. It was hard to know – we didn't treat it in detail. It was hard to know exactly what issue the Court would find most persuasive because the defendants moved to decertify in a large number of issues, not just the one the Court granted the motion upon.

So I – would this not going to require any more [6] discovery? We have it. In fact, we've already briefed it a little bit, but it really is something that we have the information for, we have the support for, and it's simply a matter of providing the Court with this.

And, you know, just as the Court can decertify a class at any time, I think that the Court should at least consider our argument on why the information we have now is a viable model under California precedent for remedying the harm that defendant has caused many Californians.

THE COURT: All right. I'd like to hear from counsel for Nutraceutical.

Mr. Hueston, what's your position with respect to this?

MR. HUESTON: Well, we would oppose a renewed motion. The record is closed. That's part of what

the Court pointed out, that you made a very clear point of asking – or it was made clear at the earliest point in the course of the litigation that the damages model needed to be provided. It was not provided.

Of course, he can file a motion for reconsideration. That's different. That's based on the existing record. He doesn't get to renew a motion and bring in new models, figures, frankly, or anything else outside the record.

We'll also note, Your Honor, there were multiple [7] reasons for denying class certification here. It was our view that the Court chose the narrowest and strongest ground. Again, that could be considered in a motion for reconsideration. That would be the only vehicle, I think, that would be appropriate for plaintiffs at this time.

THE COURT: Mr. Weston, I tend to agree. Look. You are more than entitled to file a motion for reconsideration. That's entirely your right.

But, I guess, to the extent that you are contemplating it, which I suspect you will, I think you need to focus on what was in the existing record.

It sounds like you are suggesting that it may have been in the record. Obviously, the Court took a different view.

But feel free to file your motion for reconsideration, if that's what you desire. But, obviously, Mr. Hueston will be looking very carefully to make sure that it is not a new motion with newly – that tends to

bring out, at least from your perspective, some newly discovered evidence.

So you are absolutely entitled to so, and you can file your motion for reconsideration. I suggest you do it sooner than later because I had some proposed dates that I wanted to pose out to the parties because we've got cross motions for summary judgment, a pretrial conference, and a [8] trial date.

My proposal was to have summary judgment hearing on April 27th of 2015 with a pretrial conference in May – May 18th of 2015, and then a trial date of June. Throwing out those dates, do any of those dates cause any major complications for either side?

MR. WESTON: Your Honor, I would just say that we will want to file a motion for reconsideration. And in that respect, I think it makes sense to just hold summary judgment and trial in abeyance without a particular date unless the Court is confident it can rule in, you know, on – within a specified time on it.

And that's just in part because our summary judgment motion, for instance, you know, is predicated on there being a certified class. And we would have to at least supplement that at least a little bit in order to transform it into a individual summary judgment motion.

THE COURT: All right. Mr. Hueston, what is your position with respect to the proposed dates?

MR. HUESTON: Yes, Your Honor. The only one that gives me heartburn would be trial. I currently have a trial in Hawaii in June and then –

THE COURT: You would rather be in Los Angeles than Hawaii?

MR. HUESTON: Actually, I would rather be in [9] Los Angeles. It's not a good place to try a case out there, in Honolulu. I have one in June and another in late July. The earliest I could set a trial date would be September. They're both long trials.

So at at this point, Your Honor, I would agree with plaintiffs' suggestion to hold scheduling in abeyance on motion for summary judgment, pretrial, and trial, if we could do so.

THE COURT: Okay. All right. We can do that.

When do you anticipate filing your motion for reconsideration? And I don't mean to put you on the clock. I am just curious as to, sort of, the timing. Is this going to be in the next two to three weeks? Next week? Because I understand the parties' position about perhaps not setting the trial date, but I just don't want this to linger on in the meantime.

MR. WESTON: We certainly could have it within three weeks of today, if not sooner. If the Court prefers, we could rush it and get it done in two weeks without any real issue.

THE COURT: All right. I think in light of what you said – you have alluded to the fact that you believe that there is evidence – either existed in the existing motion. Seems to me you could get something on file no later than March the 12th, which would give you ten days [10] from today.

I don't think that's unreasonable. This way we can sort of resolve this issue and get this case back on calendar.

MR. WESTON: Your Honor, that would be fine. March 12th is no problem.

THE COURT: All right. So the motion for reconsideration will be filed on or before March 12th. And then the Court will then set dates once it's had an opportunity to review the motion.

I anticipate, obviously, because the Court dealt a lot of time into the existing motion, I don't think there will be as big a lag time trying to resolve this issue because we are sort of versed and attuned it to, but we'll set some dates after the motion for reconsideration.

MR. WESTON: Thank you, Your Honor. And I just – if it's all right with the Court, can we refer back to our prior class certification brief, sort of incorporated them –

THE COURT: It's part of the record; so absolutely.

MR. WESTON: That will just make the briefing a lot shorter. And I think that covers everything.

THE COURT: All right. Anything else from defense?

[11] MR. HUESTON: No. Thank you, Your Honor.

THE COURT: Thank you both for coming in. And I'll look forward to getting your papers on or before March the 12th.

MR. HUESTON: Thank you, Your Honor.

THE COURT: All right.

(Proceedings concluded at 10:20 p.m.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: March 18, 2015.

/S/ CHIA MEI JUI
Chia Mei Jui, CSR No. 3287